

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

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APPENDIX A – JOINT AMICUS BRIEF

SUMMARY OF ARGUMENT

Adoption of the network neutrality rules proposed in the NPRM would be unlawful because Congress did not give the Federal Communications Commission power to protect Internet “openness” in the Communications Act. The proposed rules regulating the services and network management practices of broadband Internet providers must rest, if at all, on the Commission’s implied or “ancillary jurisdiction” and the NPRM fails to provide a basis upon which the exercise of such jurisdiction can be considered lawful.

The FCC is a creature of Congress. It has no “common law” ability to make law (or act in a legislative capacity), save for those powers expressly delegated to it by Congress in the Communications Act. Per Title I, section 1 of the Act, the FCC was created and given jurisdiction over interstate wire and radio commerce in communication for the purpose of making available “a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” These are clearly the overarching “ends” for which the Commission was created. Congress, however, also articulated the “means” by which the Commission was to go about carrying out these broad purposes elsewhere in the Act.

The FCC’s specific statutory responsibilities with respect to the services of common carriers, spectrum-based services, and the services of cable operators are in Titles II, III, and VI of the Act. When Congress added the category of “information service” in 1996, it refrained from adding an operative Title specifying how the FCC was to regulate such services.

Ancillary jurisdiction is a FCC-created and judicially-sanctioned doctrine that permits the agency to regulate services within its subject matter jurisdiction—interstate wire and radio communications—where such regulation is “reasonably ancillary” to its statutory responsibilities under the Act. Numerous courts have ruled that, to meet this test, there must be a requisite degree of “ancillarity” between the regulation proposed, and the statutory responsibility to which it is purportedly ancillary.

The NPRM, incorporating by reference the jurisdictional theory stated in the Commission’s 2008 *Comcast P2P Order*, asserts that the Commission has ancillary authority to prescribe rules principally under two statutory provisions: to implement the “federal Internet policy” contained in section 230(b) of the Act and to achieve the statutory goal of encouraging

broadband deployment pursuant to section 706(a) of the 1996 Act. It also appears to rely, at least to some extent, on sections 1, 201(b), and 257.

This exercise—searching for snippets and threads of regulatory authority over a communications medium as significant as the Internet in multiple, unrelated statutory provisions—should signal to the Commission that no credible source of authority to regulate Internet services exists. The Internet, as the NPRM acknowledges, is widely considered to be one of the most important platforms for communications, entertainment, freedom of speech and of the press, and civic engagement. Had Congress intended the FCC to regulate the provision of Internet services, it surely would have said so directly, and not hidden that authorization in a disparate collection of unrelated statutory policy pronouncements, preambles, and provisions. Congress does not, to paraphrase the Supreme Court, hide elephants in mouse holes.

Sections 230(b) and section 706(a) cannot provide the source of regulatory authority to which the proposed rules may be considered “reasonably ancillary” because neither directs the FCC *to regulate anything in particular*. Each provides certain regulatory goals or “ends;” neither provides the “means,” that is, an “operative” or “substantive” source of regulatory authority through which Congress intended the FCC to achieve the broad goals of the Act. Sections 230(b) and 706(a) are themselves statements of Congressional policy incapable of supporting FCC regulation of either the Internet or Internet services.

Even if policy provisions could theoretically support the adoption of behavioral rules, there is no reasonable relationship between either the specific policy directives or overall purpose of section 230 and the FCC’s proposal to regulate the terms and conditions of the provision of Internet services. Section 230(b)(2) flatly declares that it is the policy of the United States “to *preserve the vibrant competitive free market* that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*.” The remainder of section 230 creates “Good Samaritan” immunity for Internet service providers and other Internet portals that block objectionable content; it specifies *no role* for the FCC and calls for *no FCC rules* for its implementation. Section 230(b) is more convincingly read to indicate that Congress wanted the FCC to observe a policy of non-regulation or un-regulation of the Internet and Internet services generally. And that is exactly how the FCC has interpreted section 230(b) since its enactment.

In the case of section 706(a), Congress directed the FCC “to *encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” “Encourage” cannot be reasonably read as a synonym for “regulate.” The sole regulatory responsibility delegated to the FCC in section 706(b) is the obligation to produce a periodic report to Congress on whether advanced telecommunications are being deployed on a reasonable and timely basis. Only upon a negative finding, which the Commission has never made, is the FCC directed to take any action at all. The FCC itself has held that Section 706 does not expand its regulatory jurisdiction in any respect; any action the FCC may wish to take upon a negative report must be found elsewhere in the Act.

These policy provisions fail to give the FCC the authority to codify and expand its four Internet policy principles into six “rules of the road” for all broadband Internet access service providers. Even if they could, there is no close nexus or requisite degree of ancillarity between the proposed network neutrality rules and the policies to be furthered in the cited provisions. To the contrary, such regulation is more likely to deter than encourage broadband deployment, leaving the proposed rules fatally inconsistent with statutory purposes.

Nor can section 1 serve as a stand-alone source of ancillary authority on the grounds that it imposes “responsibilities” on the FCC that the agency is “required” to pursue.” In no instance has a court upheld the FCC’s exercise of ancillary jurisdiction based solely on the provisions contained in Title I of the Act. The Commission’s view that Title I may satisfy both prongs of the test for ancillary jurisdiction is untenable because Title I is considered the source of ancillary jurisdiction. The position, thus, is akin to saying that the FCC can regulate if its actions are *ancillary to its ancillary jurisdiction*, and that is one *ancillary* too many.

Congress did not delegate to the FCC regulatory authority over the Internet or anything else for that matter solely in the form of “broad policy outlines.” If it had, the Act would be very short, consisting perhaps of no more than a few provisions currently contained in Title I. The rest, would be no more than surplusage as the FCC would have a roving commission simply to “go and do good” without any statutory limitations whatsoever. No administrative agency operates under so broad a delegation of authority from Congress, and there is nothing in the Communications Act to suggest that the FCC is the exception.

Sections 201(b) and 257 too fail to provide the necessary jurisdictional reference as they concern solely communications services provided by common carriers, bear no reasonable relationship to the network management practices at issue, or otherwise fail to enlarge the scope of the FCC's existing jurisdiction over providers of broadband information services. Nor may the Commission support its proposed rules on the theory that the Commission has ancillary jurisdiction broadly based on entire Titles of the Act – II, III, and VI – simply because services provided over the Internet may affect aspects of federally regulated communications. For one thing, the obverse is no doubt true as well. Yet neither observation alters the commands of the Communications Act, and the Act neither directs nor permits the FCC to regulate the Internet simply because services provided over it affect nearly all aspects of federally regulated communications. This “everything-affects-everything” approach to FCC jurisdiction is simply untenable. By having to reach so far to demonstrate its jurisdiction, the NPRM exposes nothing more than its absence. No court has ever upheld a delegation of such limitless discretion to regulate or not, at will, to the Commission under the doctrine of ancillary jurisdiction.

Unchecked regulatory discretion under the amorphous doctrine of “ancillary jurisdiction” is every bit as big a danger to a free and open Internet as any of the other dangers the NPRM posits to support the proposed network neutrality rules. Express delegations of regulatory authority by Congress are important for two reasons: they both give power and limit its exercise in ways agreed upon by our elected representatives through duly-enacted legislation. It is particularly important that unelected government officials stay within the bounds of these delegations. Our individual freedoms as well as our democracy depend on it. If the FCC wishes to preserve the free and open Internet, it should resume its previous de-regulatory course under the Act, and refrain from attempting to adopt rules that are outside the scope of its lawfully delegated powers.

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comments are confined to the sole question posed in the NPRM whether the Commission possesses statutory authority sufficient to adopt the proposed network neutrality rules.⁵

The Commission has repeatedly asserted that it may impose certain obligations on providers of information services such as broadband ISPs under its ancillary jurisdiction, but this view of its authority has yet to be accepted in court.⁶ The scope and breadth of regulatory power claimed in support of the proposed network neutrality rules is unprecedented and contrary to the structure and provisions of the Communications Act of 1934 (“the Act”).⁷ Adoption of the network neutrality rules proposed in the NPRM would be unlawful because Congress did not give the Federal Communications Commission power to protect Internet “openness” in the Act. The proposed rules regulating the services and network management practices of broadband Internet providers must rest, if at all, on the Commission’s implicit or “ancillary” jurisdiction and the NPRM fails to provide a basis upon which the exercise of such jurisdiction can be considered lawful.

II. THE NPRM PROPOSES EXTENSIVE REGULATORY CONSTRAINTS ON THE PROVISION OF INTERNET SERVICES

The stated goal of the NPRM is to ensure an “open, safe, and secure Internet.”⁸ It proposes to do so through the imposition of six rules that would significantly constrain the flexibility of all broadband Internet access service providers (ISPs), regardless of technology, to provide service and manage their networks. The rules are needed, according to the FCC for two primary reasons: (i) there have been two instances of ISPs blocking or degrading Internet traffic

Memorandum Opinion and Order, 23 FCC Rcd 13028, ¶ 1 (Aug. 1, 2008) (*Comcast P2P Order*), appeal pending, *Comcast Corporation v. FCC*, et al., No. 08-1291, (D.C. Cir.).

⁵ NPRM ¶ 87 (“We invite comment on our view that we have jurisdiction over broadband Internet access service sufficient to adopt and enforce the proposed rules, or other rules that commenters propose”).

⁶ See, e.g., *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (Mar. 14, 2002) (*Cable Modem Declaratory Ruling*); *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*); *Internet Policy Statement*, *supra* note 4; *In re Broadband Industry Practices*, Notice of Inquiry, 22 FCC Rcd 7894 (Mar. 22, 2007) (*Broadband Industry Practices Inquiry*). Because the question is squarely presented in the pending review of the *Comcast P2P Order*, prudence would dictate that the Commission refrain from adopting the proposed rules until the court issues its ruling.

⁷ Communications Act of 1934, Pub. L. No. 73-416, 43 Stat. 1064 (codified in scattered sections of 47 U.S.C.), *amended by* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁸ NPRM ¶ 50.

without disclosure of their practices to subscribers and (ii) it is desirable to “provide greater clarity and certainty to Internet users; content, application, and service providers; and broadband Internet access service providers regarding the Commission’s approach to safeguarding the open Internet.”⁹ That is, the FCC “face[s] a dangerous combination of an uncertain legal framework with ongoing as well as emerging challenges to a free and open Internet.”¹⁰ In this regard, the NPRM suggests that broadband ISPs have an incentive to use their control over the underlying transmission capability to advantage their own value-added services or to disadvantage competitive alternatives, and that this potentiality provides an adequate basis for preemptive regulatory action.¹¹

The Commission “has a statutory responsibility to preserve and promote advanced communications networks that are accessible to all Americans and that serve national purposes.”¹² Accordingly, the NPRM claims the FCC has an appropriate role overseeing the provision of Internet services, pricing and network management practices so as to promote investment and innovation in Internet content, applications, and services; promote effective competition in the Internet access market; promote speech and civic participation; and to prevent network operators from prioritizing Internet traffic or provide over quality of service guarantees that could undermine the public interest goals of sections 230(b) and 706 (a).¹³ The problem with this broad articulation of the Commission’s regulatory powers, as we demonstrate below in Part III is that it is unsupported by either the text of the Act itself, or the controlling ancillary jurisdiction precedents.

⁹ *Id.*

¹⁰ NPRM, Prepared Statement of Chairman Julius Genachowski, Federal Communications Commission, Open Commission Meeting, Oct. 22, 2009.

¹¹ NPRM ¶¶ 67-74; *see also* Prepared Statement of Chairman Julius Genachowski, Federal Communications Commission, Open Commission Meeting, Oct. 22, 2009.

¹² NPRM ¶ 5 (*citing* 47 U.S.C. § 254(b)(2)) (“Access to advanced telecommunications and information services should be provided in all regions of the Nation.”); Telecommunications Act of 1996, Pub. L. No. 104-104, § 110 Stat. 56, 153 (1996), *codified as amended at* 47 U.S.C. § 1302; 47 U.S.C. § 230; *see also* 47 U.S.C. § 1305(k)(2) (“The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability ...”).

¹³ *See generally* NPRM ¶¶ 50-80.

A. Broadband ISPs to be Subjected to Extensive Regulation

The NPRM proposes to codify the Commission’s four existing Internet policy principles, “at their current level of generality,” as obligations of all broadband ISPs, regardless of the technology used.¹⁴ Under the proposed rules, a broadband ISP would be prohibited from (1) preventing any of its users from sending or receiving the lawful content of the user’s choice over the Internet; (2) preventing any of its users from running the lawful applications or using the lawful services of the user’s choice; (3) preventing any of its users from connecting to and using on its network the user’s choice of lawful devices that do not harm the network; and (4) depriving any of its users of the user’s entitlement to competition among network providers, application providers, service providers, and content providers. Additionally, a broadband ISP would be required to (1) treat lawful content, applications, and services in a nondiscriminatory manner; and (2) disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this rulemaking.¹⁵ All six rules would be subject to “reasonable network management,” as defined by the FCC, as well as the needs of law enforcement, public safety, and homeland security and national security authorities.¹⁶

The affirmative obligations of non-discrimination and transparency are two additional network neutrality “principles” that were not contained in the 2005 *Internet Policy Statement* (but were enforced against cable modem service provider Comcast in the *Comcast P2P Order*). The NPRM interprets the non-discrimination rule to prohibit a broadband Internet access service provider from charging a content, application, or service provider for enhanced or prioritized access to subscribers of the broadband Internet access service provider. The non-discrimination rule also is meant “to be understood in the context of [the Commission’s] proposal for a separate category of ‘managed’ or ‘specialized’ services,” discussed later in this section. To the extent

¹⁴ NPRM ¶ 89-91. This is in contrast to the Internet policy principles, which are phrased in terms of consumer entitlements.

¹⁵ NPRM ¶¶ 92, 100; Appendix A, Draft Proposed Rules for Public Input.

¹⁶ News Release, Fed. Comm’n Comm’n, Commission Seeks Public Input on Draft Rules To Preserve the Free and Open Internet, Federal Communications Commission (Oct. 22, 2009).

they do not constitute “broadband Internet access service,” “none of the principles would automatically apply to these services.”¹⁷

In contrast to the proposed non-discrimination rule, the more permissive common carrier standard pursuant to section 202(a) only prohibits “*unjust or unreasonable* discrimination.”¹⁸ The NPRM opines that a “bright-line rule against discrimination, subject to reasonable network management and specifically enumerated exceptions, may better fit the unique characteristics of the Internet” and that it will likely produce the same results as an “unjust or unreasonable” standard, by permitting providers flexibility to manage their networks.¹⁹

The sixth proposed rule requires broadband ISPs to disclose - to users, content, application, and service providers, and to the government - relevant network management practice information as deemed necessary to comply with the other network neutrality rules. As with the other proposed rules, the transparency rule is subject to reasonable network management and the needs of law enforcement and national security agencies.²⁰

The NPRM also appears to propose either a complete or partial exception for a new category of rules that it terms “managed” or “specialized” services, which are defined simply as “Internet-Protocol-based offerings provided over the same networks used for broadband Internet access services.”²¹ These vaguely defined services may “include[e] voice and subscription video services, and certain business services provided to enterprise customers” provided “over the same networks used for broadband Internet access service.”²²

The NPRM suggests that the FCC may regulate the allocation of available bandwidth for managed or specialized services versus broadband Internet access services and questions whether

¹⁷ NPRM ¶ 103-32.

¹⁸ NPRM ¶ 109 (quoting 47 U.S.C. § 202(a)).

¹⁹ NPRM ¶¶ 109-110. The Internet, according to the NPRM, “differs from other communications networks in that it was not initially designed to support just one application (like telephone and cable networks), but rather to allow users at the edge of the network to decide toward which lawful uses to direct the network”).

²⁰ NPRM ¶ 118-28.

²¹ NPRM ¶ 148 & n. 266, referencing BTOP/BIP NOFA, 74 Fed. Reg. at 33111 (July 9, 2009), http://www.ntia.doc.gov/frnotices/2009/FR_BBNOFA_090709.pdf (“In addition to providing the required connection to the Internet, awardees may offer managed services, such as telemedicine, public safety communications, and distance learning, which use private network connections for enhanced quality of service, rather than traversing the public Internet.”). The NPRM observes that these services *may* differ from the broadband Internet access services to be subjected to the network neutrality rules, such that “it may be inappropriate to apply the rules proposed here to managed or specialized services.” NPRM ¶ 149.

²² NPRM ¶ 148-49.

any of the rules proposed here for broadband Internet access service should apply to managed or specialized services.²³ Not only has this category not previously been recognized by the Commission, it appears nowhere in the Communications Act of 1934, as amended.²⁴

Although the text of the NPRM questions whether to apply the proposed network neutrality rules to the provision of managed or specialized services, the draft rules contain no express exception for such managed services, as for example, IP-based multichannel video programming services. Nor does the NPRM indicate any awareness that such rules may, depending on how they are provided, already be subject to a Congressionally-mandated regulatory framework, such as that contained in Title VI of the Act.²⁵ Setting aside, for the moment, the potential for direct statutory conflict with the mandates of Titles II, III, or VI, the NPRM contemplates the creation of an entirely new regulatory framework for an array of vaguely defined services that is potentially as vast as the Internet itself without any Congressional guidance on the matter.

The NPRM proposes to extend the network neutrality rules to all platforms for broadband Internet access, including mobile wireless broadband, while at the same time recognizing that different access platforms involve significantly different technologies, market structures, patterns of consumer usage, and regulatory history. It seeks comment on how, in what time frames or phases, and to what extent the principles should apply to non-wireline forms of broadband Internet access, including mobile wireless.²⁶

²³ NPRM ¶ 151-152.

²⁴ 47 U.S.C. §§ 151, *et seq.*

²⁵ The regulatory framework envisioned for these managed services is structurally similar to that created by Congress for cable communications under Title VI. Under Title VI, cable operators retain editorial control over the vast preponderance of their cable bandwidth, with relatively minor amounts dedicated to use by other programming services such as television broadcast programming (must carry), independent programming (commercial leased access), and public, educational, and government programming (PEG) channels. In contrast, under the proposed rules, a broadband ISP will be permitted to create and offer managed or specialized services over which it will retain “editorial control,” on some portion of its bandwidth, with the absolute amount of the bandwidth available for the network operator’s own use or speech to be determined by the FCC. This framework, together with the proposed non-discrimination rule, raises significant First Amendment concerns. *See* Barbara Esbin, The Progress & Freedom Foundation, *Net Neutrality: A Further Take on the Debate* 12-17, Progress on Point No. 16.26, Dec. 2009, <http://www.pff.org/issues-pubs/pops/2009/pop16.26-net-neutrality-further-take-on-debate.pdf>; Robert Corn-Revere, *The First Amendment, the Internet & Net Neutrality: Be Careful What You Wish For*, Progress on Point No. 16.28, Dec. 2009, <http://www.pff.org/issues-pubs/pops/2009/pop16.28-FCC-workshop-free-speech-net-neutrality.pdf>.

²⁶ NPRM ¶¶ 93, 154-157.

As illustrated above, the proposed network neutrality rules subject all broadband ISPs to extensive regulation and would significantly constrain their flexibility to respond to changing conditions and affirmatively prohibit certain new business models. They would freeze in place today's Internet operations, interfere with the organic evolution that has characterized the unregulated Internet "ecosystem," and place the FCC firmly in the middle of all future network management, service modification, and quality of service decisions.²⁷ Although there is a surface "reasonableness" to the concept of having high-level "rules of the road" for broadband ISPs, the allure of the rules quickly dissipates as one realizes that "reasonable network management," which qualifies every absolute command in the six proposed rules, is essentially defined as "reasonable network management" to be determined subsequently by the FCC. Under such an indeterminate standard, should an Internet network emergency arise at 3:00 a.m. the first call an ISP network operator will make will be to the company's regulatory counsel, rather than its network engineers.

B. The NPRM Will Result in Regulation of the Internet

The NPRM declares that the network neutrality rules will not constitute regulation of "the Internet" but only of those who provide broadband access to the Internet. This neat distinction, however, cannot be maintained in practice.²⁸ The NPRM's definitions of "the Internet" demonstrate why:

For purposes of this proceeding, we propose to define the Internet as the system of interconnected networks that use the Internet Protocol for communication with resources or endpoints (including computers, web servers, hosts, or other devices) that are reachable, directly or through a proxy, via a globally unique Internet address assigned by the Internet Assigned Numbers Authority [IANA]. ... To be considered part of the "Internet" for this proceeding, an Internet end point must be identified by a unique address assigned through the [IANA] or its delegate registry, not an address created by a user for internal purposes.²⁹

²⁷ See Barbara Esbin, The Progress & Freedom Foundation, *Net Neutrality: A Further Take on the Debate* 3-4, Progress on Point No. 16.26, Dec. 2009, <http://www.pff.org/issues-pubs/pops/2009/pop16.26-net-neutrality-further-take-on-debate.pdf>.

²⁸ NPRM ¶¶ 14, 47; Appendix A, § 8.1, Purpose and Scope ("These rules apply to broadband Internet access service providers only to the extent they are providing broadband Internet access services").

²⁹ NPRM ¶ 48 n. 103 & Appendix A, § 8.3. The NPRM offers no explanation for the need to create a new definition of "the Internet," which the FCC has previously defined in slightly different terms. See *Cable Modem Declaratory Ruling*, *supra* note 6 ¶ 1 n.1 (using the definition of the Internet that has been adopted by the

“Broadband” for purposes of the proposed rules is not separately defined; it is defined as part of “Broadband Internet access” and “Broadband Internet access service.” “Broadband Internet access” is defined as: “Internet protocol data transmission between an end user and the Internet.” Similarly, “Broadband Internet access service” is defined as: “Any communication service by wire or radio that provides broadband Internet access directly to the public, or to such classes of users as to be effectively available directly to the public.”³⁰

If the Internet is, under the NPRM’s definition, the “system of interconnected networks that use the Internet protocol for communication” via “globally unique Internet addresses” assigned by IANA, then it by definition includes “Internet Protocol data transmission between an end user and the Internet.” The NPRM’s artificial attempt to cleave off this vital part of Internet internetworking and communications by definitional fiat so that it may regulate the provision of what it terms “access” service by broadband ISPs cannot change the operational effect of its proposed rules: they will constitute regulation of the Internet.

The broadband ISPs the NPRM proposes to regulate comprise “the Internet” just as much as the Internet “content, applications and service” providers who are the intended beneficiaries of the rules. There is no generally acknowledged beginning and end to the Internet; one could say, consistent with the NPRM’s proposed definition, that it is a virtual network-of-networks that begins, ends, and includes everything between each connected person and computer utilizing the Internet protocols and the domain name system to send and retrieve information in digital form. The NPRM appears to acknowledge that end users comprise “the Internet” as Internet content providers. It does not “adopt a specific definition of content, application, or service provider because any user of the Internet can be such a provider,” stating, “[f]or example, [that] anyone who creates a family website for sharing photographs could be reasonably classified as a ‘content provider.’”³¹

Given the NPRM’s definition of the Internet, and the reality of how Internet services are provisioned and used by both end users and content, application, and service providers, it is

Federal Networking Council). Nor does it explain why the Commission eschews use of the statutory definition of “the Internet” contained in section 230(f)(1) (“The term ‘Internet’ means the international computer network of both Federal and non-Federal interoperable packet switched data networks”).

³⁰ NPRM Appendix A, § 8.3.

³¹ NPRM ¶ 99.

completely unrealistic to posit, as the NPRM does, there is an official “Internet” somewhere in the middle (pictured as a “cloud”) that is separate from broadband Internet access service providers, their subscribers, and content, application and service providers.³² To the contrary, all comprise “the Internet.”

Moreover, the NPRM explicitly notes that the Commission’s four Internet policy principles, the predecessors to four of the six proposed rules, could be read as “embodying obligations binding on content, applications, and service providers in addition to broadband Internet access service providers.”³³ The NPRM seeks “comment on the pros and cons of phrasing one or more of the Internet openness principles as obligations on other entities, in addition to providers of broadband Internet access service.”³⁴ But the Internet openness obligations the NPRM proposes for broadband ISPs already would do just that: impose regulatory obligations on providers of Internet services. They would, in short, directly regulate “the interconnected networks” that comprise the Internet and thus amount to regulation of the Internet itself.

C. The Proposed Rules Are Not Based on Expressly Delegated Regulatory Powers

The NRPM’s recitation of the Commission’s regulatory authority rests entirely on the amorphous doctrine of “ancillary jurisdiction.” Statutory authority for the proposed rules is covered primarily, but not exclusively, in a four paragraph section of the NPRM entitled, “Our Authority to Prescribe Rules Implementing Federal Internet Policy.” Statutory authority also receives oblique mention in the discussion of “Commission Goals” to be advanced by the rulemaking, and appears in the Ordering Clauses, in the recitation of “Authority” cited in support of the proposed rules contained in Appendix A of the NPRM, and in the “Legal Basis” section of the Initial Regulatory Flexibility Analysis contained in Appendix C.³⁵

The “Authority” section of the NPRM asserts that:

³² NPRM ¶ 106.

³³ NPRM ¶ 101; *Internet Policy Statement*, *supra* note 4 ¶ 4.

³⁴ NPRM ¶ 101. The dangers of such “regulatory creep” up the Internet stack are discussed in Berin Szoka & Adam Thierer, The Progress & Freedom Foundation, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, Progress Snapshot No. 5.11, Oct. 2009, <http://www.pff.org/issues-pubs/ps/2009/ps5.11-net-neutrality-MAD-policy.html>.

³⁵ NPRM ¶¶ 83-87, 5, 51-55; Appendix A, “AUTHORITY;” Appendix C at ¶ 6.

[C]onsistent with the *Comcast Network Management Practices Order*, we may exercise jurisdiction under the Act to regulate the network management practices of facilities-based broadband Internet access service providers. We have ancillary jurisdiction over matters not directly addressed in the Act whenever the subject matter falls within the agency’s general statutory grant of jurisdiction and the regulation is “reasonably ancillary to the effective performance of the Commission’s various responsibilities.” That test is met with respect to broadband Internet access service.³⁶

The NPRM also asserts that, consistent with the Supreme Court’s decision in *Midwest Video I*, the exercise of its ancillary authority over facilities-based Internet access will promote the objectives for which the FCC has been given specific assigned jurisdiction and further the achievement of legitimate statutory goals.³⁷ Specifically,

[t]he proposed rules we enunciate here will, we believe, advance the federal Internet policy set forth by Congress in section 230(b) as well as the broadband goals that section 706(a) of the Telecommunications Act of 1996 charges the Commission with achieving. Section 201(b), moreover, gives the Commission specific authority “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act.”³⁸

The NPRM observes that voice and video services are increasingly delivered over the Internet, in actual or potential competition with voice and video offerings of companies that provide broadband Internet access, and that this growing “interrelationship” of services, together with the Commission’s “general public interest mandate” supports the FCC’s ancillary jurisdiction to establish appropriate rules for the provision of broadband Internet access services. Finally, the NPRM asserts that, “[w]ith respect to Internet access via spectrum-based facilities, we have additional authority pursuant to Title III of the Communications Act.”³⁹ Although the NPRM notes the Commission has relied upon Title III authority to regulate services provided by wireless carriers it doesn’t explain how the Commission’s Title III licensing authority

³⁶ NPRM ¶ 83.

³⁷ NPRM ¶ 84; U.S. v. *Midwest Video Corp.* (*Midwest Video I*), 406 U.S. 649 (1972).

³⁸ NPRM ¶ 84.

³⁹ NPRM ¶ 86. The NPRM explains that Title III, 47 U.S.C. §§ 301-399B) contains provisions relating to use of the radio spectrum, including the Commission’s broad authority over spectrum allocation (e.g., 47 U.S.C. § 303) and licensing (e.g., 47 U.S.C. §§ 301, 307, 308), including use of auctions (47 U.S.C. § 309(i)). *Id.* at n.200.

specifically supports the exercise of ancillary jurisdiction over wireless Internet services contemplated in the proposed rules.⁴⁰

The jurisdictional analysis also references the “Commission Goals” section of the NPRM.⁴¹ There, the Commission states that “the Communications Act, related statutes, and Commission precedent [concerning Internet openness] establish a number of interrelated goals that inform the Commission’s approach to broadband Internet access service.”⁴² Specifically, the NPRM explains that extending the proposed network neutrality rules to all providers of broadband Internet access service would support a number of interrelated statutory and policy goals, including promotion of investment and innovation with respect to the Internet; promoting competition for Internet access and Internet content, applications, and services; protecting user interests, including consumer protection in commercial contexts, the development of technological tools to empower users, speech and democratic participation; protecting the Internet as a forum to true diversity of political discourse; and addressing the needs of law enforcement and public safety.⁴³ The authorities cited in support of these statutory goals are: sections 1, 157, 230(b)(1), (b)(3)-(4), 257, and 1302(a) of the Communications Act; the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(1), 123 Stat. 115, 515 (2009); and several of the Commission’s own rulings including the *Comcast P2P Order*.⁴⁴ This suggests that the FCC intends to rely on all of these provisions, together with the reasoning contained in the *Comcast P2P Order*, as supporting its ancillary jurisdiction to impose network neutrality rules on broadband ISPs.⁴⁵

⁴⁰ NPRM ¶ 86 (*citing Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Memorandum Opinion and Order on Reconsideration, 14 F.C.C.R. 16340, 16352-53, para. 27 (1999)).

⁴¹ NPRM ¶ 84.

⁴² NPRM ¶ 51.

⁴³ NPRM ¶¶ 93-94, 102 & 51- 55 (citing 47 U.S.C. §§ 151, 152, 157, 230(b)(1), 257, 1302(a)); Recovery Act § 6001(k)(1) (requiring the Commission to adopt a National Broadband Plan with the goal of promoting, among other things, “private sector investment, entrepreneurial activity, job creation and economic growth”).

⁴⁴ NPRM ¶¶ 51-54. Section 706 of the Telecommunications Act of 1996 was subsequently codified as 47 U.S.C. § 1302. These comments continue to refer to “section 706” for ease of reference.

⁴⁵ *Comcast P2P Order* ¶¶ 12-27. TechLawJournal, E-Mail Alert No. 2,008, October 23, 2009, reports that it inquired of Austin Schlick, General Counsel, FCC, what was the statutory authority for the just released NPRM, and his response was ““read our brief” in the *Comcast* case.” Because of this overlap, attached as Appendix A is the Brief Amicus Curiae of Professors James B. Speta and Glen O. Robinson and The Progress and Freedom Foundation in Support of Petitioner Comcast Corporation and Urging That the FCC’s Order Be Vacated, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Circuit Court of Appeals), available at <http://www.pff.org/issues->

The upshot of this reasoning is that the Commission may take virtually any action it deems necessary or proper for the “promotion and protection” of any of the regulatory “objectives” or “goals” found in the Act. The Commission posits that it possesses regulatory authority over nearly everything and anything connected with “the Internet” and broadband deployment under a general and free-floating “public interest mandate” to further statutory goals and policies that the Commission may exercise, or not, in its sole discretion. This expansive view of the FCC’s ancillary jurisdiction would effectively replace the lawmaking authority of Congress with that of the FCC, giving the agency unlimited freedom to regulate services not within its expressly delegated regulatory authority, unless expressly prohibited by Congress. There is, however, no indication in the Act that Congress intended to grant the FCC such broad powers. The Commission’s expansive view of its own powers threatens to undermine Congress’ power and duty to provide authority, guidance, and most importantly, *limits* for agency action through legislative action.⁴⁶

D. How Did the Commission Come to Acquire This Power?

“How did the Commission come to acquire this power?” was the core question posed by Ronald H. Coase in “The Federal Communications Commission,” his seminal paper examining the development and growth of broadcast licensing regulation.⁴⁷ It is as pertinent today as it was then: how did the Commission come to acquire the expansive lawmaking power necessary to impose such extensive regulation on the Internet and the provision of Internet services? In short, it has not. Congress has not explicitly delegated regulatory authority to the FCC over the provision of information or Internet services, and the Commission cites nothing in the Act to which such regulation can be considered reasonably ancillary. There is simply no jurisdictional “there” there, and for the reasons discussed below, the proposed rules, if adopted, would be well beyond the statutory authority of the Commission.

[pubs/filings/2009/081009-amicus-brief-comcast-vs-FCC-\(08-1291\).pdf](https://pubs/filings/2009/081009-amicus-brief-comcast-vs-FCC-(08-1291).pdf) [hereinafter *Joint Amicus Brief*]. An extended analysis of the jurisdictional and procedural flaws of the *Comcast P2P Order* is contained in Barbara Esbin & Adam Marcus, “*The Law is Whatever the Nobles Do*”: *Undue Process at the FCC*, 17 COMM.LAW CONSP. 24-27 (2009), <http://commmlaw.cua.edu/articles/v17/17.2/Esbin-Marcus-Revised.pdf>.

⁴⁶ Joint Amicus Brief 2.

⁴⁷ R.H. Coase, *The Federal Communications Commission*, Journal of Law and Economics, Vol. 2 (Oct. 1959), pp. 1-40, available at <http://www.jstor.org/stable/724927>.

III. THE FCC LACKS JURISDICTION TO ADOPT THE PROPOSED NETWORK NEUTRALITY RULES

Whether a particular exercise of ancillary jurisdiction will be found to be within the Commission's delegated authority depends on the regulatory status of the service to be regulated, and the statutory mandate to which the regulation is claimed to be "reasonably ancillary." Converged Internet Protocol-based information services delivered anytime, anywhere over a multiplicity of physical platforms have long challenged this statutory framework where regulatory consequences flow directly from the Act's "techno-legal" categories.⁴⁸ Yet the doctrine of ancillary jurisdiction recognized by the courts is based upon such categories, and it requires that any new regulation imposed by the Commission be ancillary to, and not inconsistent with, statutory mandates imposed on services so-defined. We first examine the Act's treatment of the Internet, information, and interactive computer services, and then turn to the Commission's specific ancillary jurisdiction arguments.

A. Congress Has Not Given the FCC General Regulatory Authority over the Internet or Interactive Computer Services

It is well established that the Commission "'has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'"⁴⁹ The Communications Act demonstrates no Congressional purpose to delegate to the Commission authority to regulate Internet services. Had Congress chosen to delegate such express regulatory authority to the FCC, there would be no need for the Commission to stretch its ancillary powers over providers of information services beyond all known proportions to support the proposed network neutrality rules.⁵⁰

⁴⁸ See Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 42 (1999) [hereinafter Esbin, *Internet Over Cable*]; see also Barbara S. Esbin, The Progress & Freedom Foundation, *FCC Reform: Scalpel or Steamroller?*, Progress on Point No. 15.15, at 5, Sept. 2008, <http://www.pff.org/issues-pubs/pops/2008/pop15.15FCCreform.pdf>.

⁴⁹ *Am. Library Ass'n v. FCC (American Library Association)*, 406 F.3d 689, 698 (D.C. Cir. 2005) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1091 (D.C. Cir. 2001)).

⁵⁰ See 47 U.S.C. § 230(b)(2) (preservation of the vibrant and free market that presently exists for the Internet and other interactive computer services, "unfettered by Federal or State regulation"); Joint Amicus Brief at 15 (it has been extensively noted that the 1996 Act contains very little that anticipated or included the Internet), citing John C. Roberts, *The Sources of Statutory Meaning: An Archeological Case Study of the 1996 Telecommunications Act*, 53 SMU L.REV. 143, 149 (2000) ("the 1996 Act ... almost completely failed to anticipate the Internet and the impact that Internet-based telecommunications services would have").

The unregulated status of Internet services is reflected in the relevant statutory definitions. The definitions are important indicators of Congressional intent, and lend further support to the view that Congress affirmatively desired information services such as Internet access services were to remain unregulated. The NPRM cites section 230(b) as establishing a “federal Internet policy,” that the Commission may implement through its ancillary jurisdiction, yet fails to use the definitions Congress provided in that section as the basis for its network neutrality rules.⁵¹

Section 230(f)(1) defines the term “Internet” to mean “the *international computer network* of both Federal and non-Federal *interoperable packet switched data networks*.” The term “interactive computer service” is defined as “any information service,⁵² system, or access software provider that provides or enable computer access by multiple users to a computer server, *including specifically a service or system that provides access to the Internet* and such systems operated or services offered by libraries and educational institutions.” The term “information content provider” is defined to mean “any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service.” Finally, “access software provider” is defined as “a provider of software (including client or server software), or enabling tools that” among other things “(A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.”⁵³

“Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.”⁵⁴ When Congress added the category of “information service” to the Act in 1996, it did not add a “Title” containing regulatory mandates for information services. This unregulated treatment is consistent with Commission

⁵¹ NPRM ¶ 84; *see also Comcast P2P Order* ¶ 13.

⁵² Congress added the category of “information services” to Title I in the Telecommunications Act of 1996 (“1996 Act”). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 58-59 (1996); 47 U.S.C. § 153(20).

⁵³ 47 U.S.C. § 230(f).

⁵⁴ 47 U.S.C. § 153(20) (information services exclude “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service”).

precedents treating “enhanced services,” the predecessor to information services, as unregulated data processing outside the agency’s direct Title II authority over common carriers.⁵⁵

The unregulated status of information services is therefore also consistent with section 230(b)(2), which reflects a Congressional decision to leave the “Internet” and “interactive computer service,” a category which includes “*any* information service” that “provides access to the Internet” “unfettered by Federal and State regulation.”⁵⁶ Moreover, the Commission’s decisions classifying broadband Internet access service as an “information service” are based upon this very understanding of Congressional intent.⁵⁷

In contrast to the lack of any express delegation of regulatory powers over information and Internet services, the Communications Act does grant the Commission expansive authority over a number of interstate radio and wire communications services, each addressed in substantive titles that include both general and specific grants of lawmaking power.⁵⁸ The Commission asserts that it can impose and enforce network neutrality rules in furtherance of general goals and policy statements contained within the Act, rather than solely in furtherance of its substantive powers over regulated services contained in one of the substantive titles of the Act (*i.e.*, Titles II, III or VI).⁵⁹ This view, however, is incorrect. The Commission does not have common law authority to tackle any issue relating to wire or radio communications, but must trace its authority to an explicit Congressional grant of regulatory power. As even the FCC recognizes, however, “[t]o be ‘reasonably ancillary,’ the Commission’s rules must be reasonably

⁵⁵ *Second Computer Inquiry*, Final Decision, 77 F.C.C.2d 384, ¶ 19 (1980) (*Computer II Final Decision*); *Amendment of Sections 64.702 of the Comm’n’s Rules and Regs. (Third Computer Inquiry)*, Report and Order, 104 F.C.C.2d 958, ¶ 9 (1986) (*Computer III*).

⁵⁶ 47 U.S.C. § 230(b)(2). The NPRM’s failure to utilize, let alone mention, these relevant statutory definitions is puzzling, given its primary reliance upon section 230 as the source of its ancillary authority to adopt the proposed network neutrality rules. Nonetheless, it is evident that providers of “broadband Internet access service” under the taxonomy of the NPRM are also providers of “Internet” service, “interactive computer service,” and may be both “information content providers” and “access service providers” pursuant to section 230(f)(1)-(4).

⁵⁷ See *Cable Modem Declaratory Ruling*, *supra* note 6, ¶¶ 7, 38; *Wireline Broadband Order*, *supra* note 6 at ¶ 108–09; *In re United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13285 ¶ 9 (Nov. 3, 2006) (*Broadband Over Power Line Order*); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶¶ 18, 22–26 (Mar. 22, 2007) (*Wireless Broadband Declaratory Ruling*).

⁵⁸ See 47 U.S.C. §§ 201(b), 301(h), 544.

⁵⁹ FCC Brief in Support at 20-21, 43-50, *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Circuit Court of Appeals).

ancillary to something,”⁶⁰ and it on this second prong of the test that the FCC’s attempt to regulate the provision of Internet services must fail.

Thus while the Commission undoubtedly possesses some regulatory authority over information services to the extent they may be considered adjuncts or auxiliary to service explicitly regulated under the Act, the scope of this jurisdiction is far more limited than the Commission acknowledges, and does not support the wholesale regulation of the provision of Internet services.

B. The FCC’s Ancillary Jurisdiction is Not Unbounded

The NPRM’s broad assertion of the Commission’s ancillary jurisdiction in furtherance of broad statements of statutory purposes or policies rather than specific regulatory mandates is inconsistent with the controlling case law. The description of the FCC’s ancillary jurisdiction has varied to a limited extent, but it has always included two elements: first, the FCC only has subject matter jurisdiction over “communications” by wire and radio; and second, the FCC’s substantive regulatory power over communications for which Congress has not explicitly provided regulatory directives is limited to that authority essential or even imperative to advance or protect the FCC’s explicit regulatory authority.⁶¹ Although the doctrine has been accepted by the Supreme Court as part and parcel of the FCC’s regulatory tool kit, it remains the case that it should be used sparingly, rather than expansively, as it is inconsistent “with the principle that courts should closely cabin administrative agency power to that granted by Congress,” as well as recent Supreme Court cases to this effect.⁶²

The FCC created the concept of ancillary jurisdiction in the mid-1960s, to enable it to regulate certain “communication by wire or radio,” where those communications are not within an explicit grant of regulatory authority from Congress. The Commission located this implied or “ancillary” jurisdiction on sections 1 and 2 of Title I the Act, which provide, respectively that “[f]or the purpose of regulating interstate and foreign commerce in communication by wire or

⁶⁰ *Comcast P2P Order*, *supra* note 4, ¶ 15 n.63 (emphasis added).

⁶¹ *United States v. Sw. Cable Co. (Southwestern Cable)*, 392 U.S. 157, 177–78 (1968); *see American Library Association*, 406 F.3d at 700. *See also* Joint Amicus Brief at 7-8.

⁶² Joint Amicus Brief at 8-9, & nn. 6, 7; *see also* James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 Loy. U. Chi. L. J. 15, 25 & n.56 (2003) (the ancillary jurisdiction cases are inconsistent with recent Supreme Court cases policing agency powers more strictly).

radio,” the Act “creates” the FCC, and, by its terms “[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio.”⁶³ In addition to these general statements of purpose, section 4—which describes the Commission’s organization and structure—states that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”⁶⁴

Although the courts have repeatedly stated that the FCC has “broad authority” under this doctrine to implement statutory responsibilities, they have also recognized that the FCC’s ancillary authority nonetheless has limits.⁶⁵

1. The Scope of Ancillary Jurisdiction Recognized by the Courts

The most authoritative cases on ancillary jurisdiction are the original Supreme Court decisions establishing and delimiting the doctrine: *Southwestern Cable*, *Midwest Video I* and *Midwest Video II*.⁶⁶ These decisions are discussed at length, as the three decisions are critical to understanding the limited scope of the FCC’s ancillary authority.⁶⁷ Taken together, these three Supreme Court cases establish a limited or “bounded” doctrine that permits the FCC to act where the Act applies—generally to wire and radio communications—even where the Act contains no express regulatory mandates for the agency to implement over that subject matter. However, this jurisdiction extends only insofar as the FCC can demonstrate that its action is reasonably required for, if not imperative to, the implementation of one or more of the Act’s express regulatory mandates. In other words, the Supreme Court has recognized that the FCC’s subject matter jurisdiction must be interpreted broadly, but the FCC’s lawmaking powers to impose regulatory constraints on the provision of the expansive array of communications falling within its jurisdiction is far more circumscribed. Above all, and contrary to the Commissions’ view, the

⁶³ 47 U.S.C. §§ 151, 152(a).

⁶⁴ 47 U.S.C. § 154(i).

⁶⁵ See *Southwestern Cable*, 392 U.S. at 177–78; *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 696 (1979).

⁶⁶ See *Southwestern Cable*, 392 U.S. at 178; *Midwest Video I*, 406 U.S. at 669–70; *Midwest Video II*, 440 U.S. at 697.

⁶⁷ The FCC’s Brief in Support argues that just *Southwestern Cable* and *Midwest Video I* are controlling on the question of the FCC’s jurisdiction to implement network neutrality mandates. Brief in Support at 32–33. This view is erroneous. As discussed below, the doctrine of ancillary jurisdiction cannot be fully understood without consideration of the Court’s decision in *Midwest Video II* to overturn the Commission’s expansive regulatory regime for cable television service prior to the addition of Title VI to the Act.

Court's actions in these cases demonstrates that Title I ancillary jurisdiction is a derivative, not generative, source of authority and it is limited to services that are auxiliary to regulated services in cases where their regulation is essential to advance or protect the Commission's explicit regulatory responsibilities contained in the operative titles of the Act.⁶⁸

a. The Supreme Court Has Not Upheld Plenary Assertions of Ancillary Jurisdiction

Southwestern Cable. The question presented in *Southwestern Cable* was whether the FCC, prior to the enactment of Title VI, had authority under the Act to regulate cable television systems—then known as “community antenna television” (“CATV”)—and if so, whether the FCC had the authority to issue an order restricting the expansion of a television broadcast station's service via cable beyond certain broadcast contours.⁶⁹ The FCC had justified its distant signal importation rules as necessary—if not imperative—to prevent a feared destruction or serious degradation of the service offered by television broadcast stations.⁷⁰ Crucial to the FCC's justification was the fact that in the early days of cable, it was completely dependent on the retransmission of broadcast television signals, a regulated service. The FCC viewed cable television as a purely auxiliary or adjunct service that performed a function similar to radio translators licensed to rebroadcast the signals of conventional stations in order to bring service to areas that could not receive them.⁷¹

In examining the Commission's actions, the Court first found that the FCC had broad subject matter jurisdiction over “all interstate and foreign communication by wire or radio,” which includes cable systems as they are comprised within the term “communication by wire or

⁶⁸ See *American Library Association*, 406 F.3d at 708; see also W. Kenneth Ferree, The Progress & Freedom Foundation, *Elephants Do Not Hide in Mouse Holes*, Progress Snapshot No. 4.16, at 3, Aug. 2008, <http://www.pff.org/issues-pubs/ps/2008/ps4.16wholesalealacarte.html>; Joint Amicus Brief at 6-15.

⁶⁹ *Southwestern Cable*, 392 U.S. at 160–61.

⁷⁰ *Id.* at 164–66. The challenged rules required that cable systems bringing competing signals into the service area of a broadcast station whose signal they also carried to avoid duplication of the local station programming on the same day such programming was broadcast, and to refrain from importing new distant signals into the 100 largest television markets unless first demonstrating that the service would comport with the public interest. *Id.* at 166–67.

⁷¹ Joint Amicus Brief 11-12. This view persisted for some time, as evidenced, for example, by the Judge Sporkin's concurring opinion in the lower court decision upholding the “must carry” provisions of Title VI against First Amendment challenge. See *Turner Broadcasting System, Inc. v. FCC*, 819 F.Supp. 32, 52 (D.C. Cir. 1993) (“For several decades, while studying the issue, Congress left regulation of the cable industry to the FCC. In part because of its origin as an adjunct to broadcasting, cable became cloaked in much of the regulatory culture enveloping the broadcast industry”) (emphasis added).

radio.”⁷² Additionally, the Court observed that in 1934 Congress could not foresee every form of wire or radio communications and therefore built flexibility for the FCC into the Act to allow the Commission to effectively perform its express regulatory obligations.⁷³ Thus, where an activity is covered by Title I’s broad grant of authority over wire and radio communication, Titles II and III do not otherwise limit the FCC’s subject matter jurisdiction. That is, the FCC’s subject matter jurisdiction is not limited to common carrier wire or radio communications or radio and television broadcasting services.

Next, the Court acknowledged that the FCC “ha[d] reasonably concluded that regulatory authority over CATV is *imperative* if it is to perform with effectiveness certain of its other responsibilities.”⁷⁴ In particular, the FCC needed to exert jurisdiction over cable to carry out its “core obligation” pursuant to section 307(b) of “providing a widely dispersed radio and television service” that is equitably distributed “among states and communities,” and its section 303(f) and (h) obligations “to prevent interference among ... stations.”⁷⁵ Accordingly, the Court found that the FCC reasonably concluded that the successful performance of its responsibilities for the orderly development of local television broadcasting “demands prompt and efficacious regulation of [CATV] systems,” and that it would not “prohibit administrative action *imperative* for the achievement of an agency’s ultimate purposes” in the absence of evidence that Congress intended to so limit the agency.⁷⁶ Based on these findings, the Court determined that the FCC had authority under section 152(a) that is restricted to that reasonably ancillary to the effective performance of the Commission’s various Title III responsibilities for the regulation of television broadcasting. Additionally, the Court found “[t]he Commission may, for these purposes, issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public convenience, interest or necessity requires.’” Significantly, the Court refrained from expressing any view “as to the Commission’s authority, if any, to regulate CATV under any other circumstances or for any other purposes.”⁷⁷

⁷² *Southwestern Cable*, 392 U.S. at 167–68 (quoting 47 U.S.C. 152(a) (1964)).

⁷³ *Id.* at 172–73.

⁷⁴ *Id.* at 173 (emphasis added).

⁷⁵ *Id.* at 173–74.

⁷⁶ *Id.* at 177 (emphasis added).

⁷⁷ *Id.*

Southwestern Cable established a doctrine of limited scope: the exercise of ancillary regulatory authority is appropriate when imperative for the effective performance of the FCC's express statutory mandates such that its absence would thwart the successful performance of these duties. In the case of the distant signal importation rules, the statutory authority to which cable regulation was reasonably ancillary was the FCC's core obligations with respect to television broadcast stations contained in several specific provisions of Title III.⁷⁸ Only after an appropriate jurisdictional foundation is recognized may the Commission resort to its authority pursuant to section 303(r) to issue rules, regulations, and prescribe restrictions.⁷⁹ The Supreme Court went no further in *Southwestern Cable* than to recognize the FCC's authority over the subject matter of cable television, a service adjunct or auxiliary to regulated broadcasting services, and to uphold the agency's creation of the distance signal importation rule as reasonably ancillary to the comprehensive system of broadcast licensing established by Congress in Title III.

Midwest Video I. After its ancillary jurisdiction over cable systems was upheld in *Southwestern Cable*, the FCC expanded the cable regulatory framework, and industry challenges quickly followed. Four years after *Southwestern Cable*, *Midwest Video I* provided the Court with the opportunity to further refine the doctrine of ancillary jurisdiction in a challenge to the recently crafted program origination rules.⁸⁰ A plurality of the Court stated:

[T]he critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services"⁸¹

The plurality found the program origination rule reasonably ancillary to the effective performance of the FCC's various responsibilities for the regulation of television broadcasting, and therefore within the agency's authority. Specifically, the program origination rules were ancillary to the FCC's obligation to "facilitate the more effective performance of [its] duty to

⁷⁸ See *id.* at 173–74.

⁷⁹ See *id.* at 177; 47 U.S.C. § 303(r) (2000).

⁸⁰ See *Midwest Video I*, 406 U.S. 649.

⁸¹ *Id.* at 667–68. In other words the question is "whether the Commission's program-origination rule is 'reasonably ancillary to the effective performance of (its) various responsibilities for the regulation of television broadcasting.'" *Id.* at 662–63.

provide a fair, efficient, and equitable distribution of television service to each of the several States and communities” in granting station licenses pursuant to section 307(b) of the Act.⁸²

The plurality opinion reviewed the limited extent of the Court’s action in its earlier decision in *Southwestern Cable*:

We ... held that § 2(a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act’s other provisions governing common carriers and broadcasters apply. ... This conclusion, however, did not end the analysis, for § 2(a) does not in and of itself prescribe any objectives for which the Commission’s regulatory power over [cable] might properly be exercised. We accordingly went on to evaluate the *reasons for which the Commission had asserted jurisdiction* and found that “the Commission has reasonably concluded that regulatory authority over [cable] is *imperative* if it is to perform with appropriate effectiveness certain of its other responsibilities. ... In particular, we found that the Commission had reasonably determined that “the unregulated explosive growth of [cable],” especially through “its importation of distant signals into the service areas of local stations” and the resulting division of audiences and revenues, threatened to “deprive the public of the various benefits of the system of local broadcasting stations” that the Commission was charged with developing and overseeing under § 307(b) of the Act.⁸³

The plurality found that, “the Commission’s legitimate concern in the regulation of [cable] is not limited to controlling the competitive impact [cable] may have on broadcast services.”⁸⁴ Rather, the Commission has “various responsibilities for the regulation of television broadcasting,” that go beyond simply “assuring that broadcast stations operating in the public interest do not go out of business.”⁸⁵ These other responsibilities include “requiring [cable] affirmatively to further statutory policies,” in recognition of the fact that cable systems “have arisen in response to public need and demand for improved television service and perform valuable services in this respect.”⁸⁶ Accordingly, the plurality found the challenged regulation was reasonably ancillary to several of the Commission’s statutory responsibilities with respect to broadcast regulation, and was supported by substantial record evidence that it would promote the public interest.⁸⁷

⁸² *Id.* at 670 (citing 47 U.S.C. § 307(b) (2000)).

⁸³ *Id.* at 660–62 (emphasis added) (citations omitted).

⁸⁴ *Id.* at 664.

⁸⁵ *Id.*

⁸⁶ *Id.* at 664–65.

⁸⁷ *Id.* at 670–74.

Chief Justice Burger concurred only in the result in *Midwest Video I* on the ground that cable regulation was within the Commission’s Title III jurisdiction over broadcast stations.⁸⁸ The fact that the Court viewed cable as an adjunct to television broadcasting service is reflected in Chief Justice Burger’s concurring—and therefore controlling—opinion: “CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.”⁸⁹ And, as an adjunct to a regulated service, cable television providers reasonably may be subjected to FCC regulation: “Those who exploit the existing broadcast signals for private commercial surface retransmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.”⁹⁰

Notwithstanding the close relationship between cable and broadcasting, the FCC’s cable program origination rules strained the bounds of its ancillary powers. Justice Burger wrote:

Candor requires acknowledgement, for me at least, that the Commission’s position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of [cable] suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.⁹¹

It is thus apparent that the view that cable was within the scope of the Commission’s delegated authority for the regulation of television broadcasting was grounded, to a significant degree, in the view that cable was either “an auxiliary to broadcasting through the retransmission by wire of intercepted television signals to viewers otherwise unable to receive them because of distance or local terrain” or was itself an adjunct to or a form of broadcasting, which the FCC already had extensive powers to regulate under Title III.⁹²

Midwest Video I reaffirmed three things. First, section 2(a) is not merely a prescription of the forms of communication to which Title II and III apply—that is, a source of subject matter

⁸⁸ See *id.* at 675 (Burger, J., concurring) (“[Cable] is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.”).

⁸⁹ *Id.*

⁹⁰ *Id.* at 676.

⁹¹ *Id.*

⁹² *Id.* at 650 (majority opinion).

jurisdiction.⁹³ Second, section 2(a) is a source of ancillary authority, but the section does not itself prescribe the objectives for which the Commission’s regulatory power over the service to be regulated may properly be exercised.⁹⁴ Third, that the objectives of the exercise of regulatory power—that to which the challenged exercise is reasonably ancillary—must derive from the Commission’s other regulatory responsibilities.⁹⁵ That the service to be regulated pursuant to ancillary jurisdiction must in some way be an adjunct or auxiliary to a regulated service is implicit in the Court’s reasoning and action.

Midwest Video II. The next set of FCC cable regulations promulgated under ancillary jurisdiction presented for review proved to be a bridge too far for a majority of the Supreme Court in *Midwest Video II*.⁹⁶ Although the FCC asserts, in its Brief in Support of the *Comcast P2P Order*, that *Southwestern Cable* and *Midwest Video I* are controlling on the question of its ancillary jurisdiction to impose network neutrality mandates, it is *Midwest Video II* that should be viewed as controlling, because the elaborate cable regulations struck down by the Court bear a distinct resemblance to the network neutrality rules proposed in the NPRM.

In *Midwest Video II*, the challenged rules: (1) prescribed a series of interrelated obligations ensuring the set aside of public, educational, and governmental (“PEG”) and leased access channels on cable systems of a designated size; (2) deprived the cable operators of “all discretion regarding who may exploit their access channels and what may be transmitted over such channels”; and (3) instructed the cable operators to “issue rules providing for first-come, nondiscriminatory access on public and leased channels.”⁹⁷

Before addressing the merits, the Court reviewed its prior ancillary jurisdiction cases. *Southwestern Cable* upheld the Commission’s regulatory effort because it was justified as “imperative to prevent interference with the Commission’s work in the broadcasting area.”⁹⁸ With respect to *Midwest Video I*, the Court stated “[f]our Justices, in an opinion by Mr. Justice Brennan, reaffirmed the view that the Commission has jurisdiction over cable television and that

⁹³ See *id.* at 662–63.

⁹⁴ See *id.*

⁹⁵ See *id.* at 670.

⁹⁶ *Midwest Video II*, 440 U.S. 689.

⁹⁷ *Id.* at 693–94.

⁹⁸ *Id.* at 706–07 (emphasis added).

such authority is delimited by its statutory responsibilities over television broadcasting,” whereas the “Chief Justice, in a separate opinion concurring in the result, admonished that the Commission’s origination rule ‘[strained] the outer limits’ of its jurisdiction.”⁹⁹ The Court reiterated that the FCC’s regulations were upheld in *Midwest Video I* because they promoted “long-established goals of broadcasting regulation,” as embodied in Title III.¹⁰⁰

Against this backdrop, the *Midwest Video II* Court found the FCC’s cable access rules qualitatively different from those previously approved, and also in contravention of statutory limitations designed to safeguard the journalistic freedom of broadcasters, particularly the command of § 3(h) of the Act that a “person engaged in ... broadcasting shall not ... be deemed a common carrier.”¹⁰¹ Unlike the local programming origination rules, which compelled cable operators to assume a more positive role in the composition of their programming comparable to that of television broadcasters, the access rules “transferred control of the content of cable access channels from cable operators to members of the public who wished to communicate by the cable medium.”¹⁰² Although section 3(h) by its terms precludes the FCC from compelling television broadcasters to act as common carriers, the Court stated “that same constraint applies to the regulation of cable systems,” and held that the FCC exceeded its jurisdiction by attempting to “relegat[e] cable systems, pro tanto, to common-carrier status” with its access rules.¹⁰³ As Justice White stated:

Of course, § 3(h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting, the Commission’s jurisdiction under § 2(a) would be unbounded. ... Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.¹⁰⁴

With respect to Congressional guidance, the Court stated: “Congress has restricted the Commission’s ability to advance objectives associated with public access at the expense of journalistic freedom of persons engaged in broadcasting,” and the force of that limitation “is not

⁹⁹ *Id.* at 698–99.

¹⁰⁰ *Id.* at 707.

¹⁰¹ *Id.* at 700; 47 U.S.C. § 153(10) (2000).

¹⁰² *Midwest Video II*, 440 U.S. at 700.

¹⁰³ *See* 47 U.S.C. § 153(10); *Midwest Video II*, 440 U.S. at 695, 705 n.15, 700.

¹⁰⁴ *Id.* at 706.

diminished by the variant technology involved in cable transmissions.”¹⁰⁵ Unlike the regulations that were found within the scope of the FCC’s ancillary authority in *Southwestern* and *Midwest Video I*, where a lack of Congressional guidance led the Court to defer to the Commission’s judgment concerning the scope of its authority, “here there are strong indications that agency flexibility was to be sharply delimited.”¹⁰⁶

Thus, in *Midwest Video II*, the Supreme Court restricted the scope of the FCC’s ancillary jurisdiction by finding that if the basis for jurisdiction over cable is that the Commission’s authority is ancillary to the regulation of broadcasting, the cable regulation imposed may not be antithetical to a basic regulatory parameter established for broadcasting by Congress. The Court reiterated that any exercise of ancillary jurisdiction under section 2(a) of the Act must make “reference to the provisions of the Act directly governing” the activity to which the requirement is alleged to be ancillary.¹⁰⁷ Thus, a permissible exercise of ancillary jurisdiction applies to a service that is adjunct or auxiliary to a regulated service, must be reasonably ancillary to provisions under the substantive Titles of the Act authorizing particularized regulation of communications by wire or radio, and must not be contrary to any express provision of the Act. As implied by the phrase “ancillary jurisdiction,” the authority exercised must be in relation to some other regulatory authority; the something else providing the jurisdictional “hook” or basis for the conclusion that Congress intended to the FCC to regulate in a particular area. Otherwise, the doctrine of ancillary jurisdiction would unlawfully extend the Commission’s regulatory jurisdiction beyond the bounds explicitly established by Congress.

b. Recent D.C. Circuit Cases Have Recognized the Bounded Nature of Ancillary Jurisdiction

The Supreme Court’s original and circumscribed articulation of the jurisprudential basis of the Commission’s ancillary jurisdiction has become somewhat obscured by a succession of lower court rulings, some of which contain language suggesting that the agency may ground its

¹⁰⁵ *Id.* at 707.

¹⁰⁶ *Id.* at 708. The dissenting opinion, authored by Justice Stevens, took issue with the view that section 3(h), one of the definitional sections contained in Title I of the Act, “places limits on the Commission’s exercise of powers otherwise within its statutory authority because a lawfully imposed requirement might be termed a ‘common carrier obligation.’” *Id.* at 710–11 (Stevens, J., dissenting). The dissent viewed the rules at issue as an example of the FCC’s “flexibility to experiment” in choosing to replace the mandatory local origination rule upheld in *Midwest Video I* with what the agency viewed as the less onerous local access rules. *Id.* at 713.

¹⁰⁷ *Id.* at 706 (majority opinion).

ancillary jurisdiction solely in the general grant of regulatory authority contained in Title I of the Act or in furtherance of broad statutory policies or purposes rather than regulatory mandates.¹⁰⁸ As demonstrated below in Part C.1, however, Title I was not the sole source of an exercise of ancillary jurisdiction by the courts in any of the cases relied upon by the Commission in either the *Comcast P2P Order* or its Brief in Support, and in no case have the courts upheld an exercise of ancillary jurisdiction grounded solely on a broad statement of statutory purpose or policy.

In *MPAA*, the D.C. Circuit addressed the question whether the FCC had delegated authority under Section 1 of the Act to enact video description rules.¹⁰⁹ The 1996 Act added to the Communications Act two rules covering video programming accessibility: section 613(a)–(d), which dealt with closed captioning and section 613(f), which addressed video description technologies.¹¹⁰ The closed captioning provision required the FCC to conduct an inquiry, produce a report, and prescribe regulations.¹¹¹ In contrast, for video description, section 613(f) required only that the FCC produce a report for Congress.¹¹² By a three-to-two vote, the FCC concluded that it had statutory authority to promulgate video description rules.¹¹³ A majority of the D.C. Circuit disagreed, and the rules were vacated.¹¹⁴

The *MPAA* majority found that *Chevron* deference was inapplicable because the FCC had exceeded its delegated authority.¹¹⁵ The court found that the FCC lacked delegated authority

¹⁰⁸ *Comcast P2P Order* at ¶ 22, citing *Computer & Communications Industry Ass’n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (*CCIA*) (upholding exercise of ancillary jurisdiction over customer premises equipment in furtherance of Title I goal of “assur[ing] a nationwide system of wire communications service at reasonable prices”); FCC Brief in Support at 31-32.

¹⁰⁹ *Motion Picture Ass’n of Am. v. FCC (MPAA)*, 309 F.3d 796, 798 (D.C. Cir. 2002).

¹¹⁰ 47 U.S.C. § 613(a)–(d), (f) (2000).

¹¹¹ 47 U.S.C. § 613(a)–(b).

¹¹² 47 U.S.C. § 613(f).

¹¹³ *In re Digital Broadcast Content Protection*, Report and Order & Further Notice of Proposed Rulemaking, 18 FCC Rcd 23550, ¶¶ 29–34 (Nov. 4, 2003) (*Broadcast Flag Order*). Although the FCC had relied on a combination of sections 1, 2(a), 4(i), and 303(r) for its authority, at oral argument counsel for the Commission essentially conceded that “if the agency cannot find its authority in section 1 then the video description regulations must be vacated by the court.” *MPAA*, 309 F.3d at 803.

¹¹⁴ *MPAA*, 309 F.3d at 803, 807.

¹¹⁵ *MPAA*, 309 F.3d at 800–01. See generally *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (explaining that on an issue of statutory interpretation where Congress is silent, courts will defer to the interpretation of the administrative agency charged with implementing the statute so long as the administrative agency’s interpretation is reasonable).

under section 1 to enact video description rules because the rules implicated the content of video programming, and as such, went well beyond the agency's charge under section 1.¹¹⁶

Both the terms of [section] 1 and the case law amplifying it focus on the FCC's power to promote the accessibility and universality of transmission, not to regulate program content. Neither the FCC's Order nor its brief to this court cite any authority to suggest otherwise. To regulate in the area of programming, the FCC must find its authority in provisions other than [section] 1.¹¹⁷

The *MPAA* majority also confirmed that the FCC may avail itself of section 303(r) and 4(i) authority only where Congress has delegated regulatory authority in an area.¹¹⁸ With respect to section 303(r), the provision “simply [could not] carry the weight of the Commission's argument” that it may regulate video description because it is a “valid communications policy goal” and the rules are “in the public interest.”¹¹⁹ The court observed that simply because the FCC claims an action is taken in the public interest and to carry out the provisions of the Act does not mean it is necessarily authorized by the Act; “[t]he FCC must act pursuant to delegated authority before any ‘public interest’ inquiry [is] made under [section] 303(r).”¹²⁰ Nor did the *MPAA* majority find the FCC's argument that section 4(i), standing alone, gives it authority to promulgate the disputed rules, adopting the reasons cited by then-Chairman Powell in his dissent to the Commission order adopting the rules:

It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a “necessary and proper” clause. Section 4(i)'s authority must be “reasonably ancillary” to other express provisions. And, by its express terms, our exercise of that authority cannot be “inconsistent” with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded carte blanche under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit such action, it would be able to expand greatly its regulatory reach.¹²¹

The agency's remaining jurisdictional argument—that section 2(a) supported the challenged regulations—was summarily rejected for similar reasons.¹²² Finally, the court stated:

¹¹⁶ *Id.* at 803–04.

¹¹⁷ *Id.* at 804; *see, e.g.*, 47 U.S.C. § 531 (2000) (governing designation of cable channels for public, educational, or governmental use).

¹¹⁸ *MPAA*, 309 F.3d at 805–06.

¹¹⁹ *Id.* at 806.

¹²⁰ *Id.*

¹²¹ *Id.* (quoting *Broadcast Flag Order*, *supra* note 113, at 15276 (Powell, Chmn., dissenting)).

¹²² *Id.*

[I]f there were any serious question about [the] proper result in this case, all doubt is resolved by reference to [section] 713. In [section] 713(f), Congress authorized the Commission to produce a report—nothing more, nothing less. ... Once the Commission completed the task of preparing the report on video description, its delegated authority on the subject ended.¹²³

It would be a mistake to view the *MPAA* case as simply standing for the proposition that Section 1 does not encompass the subject of video programming content.¹²⁴ First, *MPAA* stands for the proposition that where the Act authorizes the FCC to produce a report, but not to undertake other regulatory responsibilities with regard to the subject matter, the agency's delegated authority on the subject ends with the production of the report. Second, the *MPAA* majority makes clear that FCC subject matter jurisdiction under Section 1 may be broad, but its regulatory authority is more limited. As the court explained, “[t]o regulate in the area of programming, [as opposed to merely “promoting” broad statutory goals], the FCC must find its authority in provisions other than section 1.”¹²⁵ Although the Commission dismisses this portion of *MPAA* as dicta, it is entirely consistent with the controlling Supreme Court cases on ancillary jurisdiction upholding the Commission regulations solely where the challenged rules are necessary or imperative to enable the FCC to carry out its expressly mandated regulatory duties over broadcasting contained in Title III.¹²⁶ In other words, Title I alone cannot satisfy both prongs of the test for ancillary jurisdiction; one of the titles delegating regulatory responsibilities to the agency must provide the hook upon which to hang an exercise of ancillary jurisdiction.

In *American Library Association*, the D.C. Circuit found the FCC's broadcast flag rules—which sought to regulate consumers' use of television receiver equipment after the

¹²³ *Id.* at 807.

¹²⁴ See *Comcast P2P Order*, *supra* note 4, ¶ 16 n.76.

¹²⁵ See *MPAA*, 309 F.3d at 804.

¹²⁶ FCC Brief in Support at 49, citing language in *Midwest Video I* suggesting that the Commission may exercise ancillary jurisdiction to protect and promote “objectives,” “regulatory goals” or further “statutory policies,” rather than regulatory mandates. See *Midwest Video I*, 406 U.S. at 667-668, 653. Despite the Court's characterizations of the doctrine, its actions have required the Commission to show that the regulation applies to a communications service within its subject matter jurisdiction, that it the service to be regulated is closely related to the regulated service to which it is said to be “reasonably ancillary,” and that the regulation is required, if not imperative, for the Commission to effectively carry out its mandated regulatory duties under a substantive Title of the Act. See discussion *supra* in Part III.B.

completion of the broadcast transmission—outside the scope of the FCC’s delegated authority.¹²⁷

The *American Library Association* court reiterated that:

The FCC, like other federal agencies, “literally has no power to act ... unless and until Congress confers power upon it.” ... The Commission “has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.” ... Hence, the FCC’s power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it.¹²⁸

The FCC had relied solely on its ancillary jurisdiction under Title I to justify its action in the broadcast flag proceeding.¹²⁹ Sections 1, 2(a) and (3) were cited to support the view that the Commission had the “authority to promulgate regulations to effectuate the goals and provisions of the Act even in the absence of an explicit grant of regulatory authority, if the regulations are reasonably ancillary to the Commission’s specific statutory powers and responsibilities.”¹³⁰ However, the *American Library Association* court found the broadcast flag rules to emanate from an *ultra vires* action by the FCC.¹³¹

After reviewing the *Southwestern Cable*, *Midwest Video I* and *Midwest Video II* decisions, the *American Library Association* court described the Supreme Court’s approach to ancillary jurisdiction as “cautionary” despite the fact that the challenged exercises of authority pertained to subjects within the FCC’s general grant of jurisdiction under Title I.¹³² The broadcast flag rules floundered because they were outside the scope of the FCC’s subject matter

¹²⁷ See *Am. Libr. Ass’n v. FCC (American Library Association)*, 406 F.3d 689, 707 (D.C. Cir. 2005).

¹²⁸ *Id.* at 698 (citations omitted) (alterations in original).

¹²⁹ *Id.* at 699–700.

¹³⁰ *Id.* at 698.

¹³¹ *Id.* at 699.

¹³² *Id.* at 702–03. See also *Illinois Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1399 (7th Cir. 1972). The Seventh Circuit agreed with an FCC determination that it has no power to regulate the construction of an office tower, claimed to interfere with the reception of broadcasting television reception, under either its direct statutory authorization or its ancillary authority. *Id.* at 1401. The court observed that *Southwestern Cable* recognized a very limited extension of the FCC’s authority over activities clearly falling within its subject matter jurisdiction under Title I, but even there the Supreme Court “appeared to be treading lightly.” *Id.* at 1400. In view of this, the petitioners’ argument that “if the ‘communications’ substantially are within the FCC’s power to regulate, so are all activities which ‘substantially affect communications,’” was rejected on the grounds that the argument was “too broad” as it “would result in expanding the FCC’s already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature.” *Id.*

jurisdiction under the first prong of the test for ancillary jurisdiction.¹³³ In the case of the broadcast flag rules, the D.C. Circuit found “great caution” to be warranted because the broadcast flag rested on no apparent statutory foundation other than Title I, “and, thus, appear[s] ... ancillary to nothing.”¹³⁴ As the D.C. Circuit noted:

We can find nothing in the statute, its legislative history, the applicable case law, or agency practice indicating that Congress meant to provide the sweeping authority the FCC now claims over receiver apparatus. And the agency’s strained and implausible interpretations of the definitional provisions ... do not lend credence to its position. As the Supreme Court has reminded us, Congress “does not ... hide elephants in mouseholes.”¹³⁵

The D.C. Circuit observed that the FCC has never possessed ancillary jurisdiction under the Act to regulate consumer electronics devices usable for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.¹³⁶ Neither had the Commission, “in the more than 70 years of the Act’s existence ... claimed such authority nor purported to exercise its ancillary jurisdiction in such a far-reaching way.”¹³⁷ The court further underscored this point:

The FCC argues that the Commission has “discretion” to exercise “broad authority” over equipment used in connection with radio and wire transmissions, “when the need arises, even if it has not previously regulated in a particular area.” This is an extraordinary proposition. “The [Commission’s] position in this case amounts to the bare suggestion that it possesses plenary authority to act within a given area simply because Congress has endowed it with some authority in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority” from Congress. The FCC, like other federal agencies, “literally has no power to act ... unless and until Congress confers power upon it.”¹³⁸

Taken together, *MPAA* and *American Library Association* confirm the scope of the FCC’s ancillary jurisdiction is far more limited than the Commission portrays it to be: (1) the FCC’s necessary and proper-type powers under sections 4(i), and 303(r) may be relied upon only

¹³³ *American Library Association*, 406 F.3d at 701, 703 (explaining that the first prong of the test requires that the regulation cover “interstate or foreign communication by wire or radio” and finding that the broadcast flag rules did not do so).

¹³⁴ *Id.* at 702 (emphasis added).

¹³⁵ *Id.* at 704 (emphasis added).

¹³⁶ *Id.* at 705.

¹³⁷ *Id.* at 705 (citations omitted).

¹³⁸ *Id.* at 708 (emphasis added) (citations omitted).

where Congress has delegated regulatory authority in an area; (2) the delegation of some authority over an area does not mean that the Commission has been give plenary authority over that area; and (3) regulatory authority over an area cannot rest on section 1 alone, but must be found in operative provisions of the Act.¹³⁹

c. *Brand X* Was Not an Ancillary Jurisdiction Case and Does Not Authorize FCC Regulation of Internet Services

In an attempt to bolster its claim, the Commission has argued that that the Supreme Court's decision in *Brand X* upholds the Commission's authority to regulate broadband ISPs pursuant to its ancillary jurisdiction.¹⁴⁰ The *Comcast P2P Order* states that "any assertion the Commission lacks the requisite authority over providers of Internet broadband access services, such as Comcast, has been flatly rejected by the U.S. Supreme Court."¹⁴¹ The Court, the FCC argued, rejected this argument in its decision in *National Cable and Telecommunications Association v. Brand X* reviewing the FCC's *Cable Modem Declaratory Ruling*.¹⁴² According to the Commission, the "Court specifically stated that 'the Commission has jurisdiction to impose additional regulatory obligations [on information service providers] under its Title I ancillary jurisdiction to regulate interstate and foreign communications,' and that 'the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.'"¹⁴³

The FCC's Brief in Support argues that the Supreme Court in *Brand X* expressly upheld the Commission's ancillary jurisdiction over information services to address ISP network management practices that impinge "on the open Internet, undermine the ability of broadband subscribers to use innovative Internet applications, and threaten competition in FCC-regulated

¹³⁹ The Commission places great reliance on the D.C. Circuit's decision in *CCIA*, 693 F.2d 198. The reasons why this reliance is misplaced are discussed in Part C.1.c., *infra*.

¹⁴⁰ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (*Brand X*), 545 U.S. 967, 968 (2005); NPRM ¶ 29; FCC Brief in Support at 19-20, 30-32.

¹⁴¹ *Comcast P2P Order*, *supra* note 4, ¶ 14.

¹⁴² *Id.*

¹⁴³ *Id.* (citation omitted). The *Comcast P2P Order* also sought to rely on the Supreme Court's discussion of the doctrine of ancillary jurisdiction in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). As with *Brand X*, *Iowa Utils.* was not an ancillary jurisdiction case, and does not support the FCC's claim that it may adopt the proposed network neutrality rules pursuant to its ancillary jurisdiction. See *Undue Process*, *supra* note 45 at 45-46.

programming distribution markets.”¹⁴⁴ Further, that such regulation carries forward the FCC’s historical framework for basic and enhanced services under the *Computer Inquiries*, where the Commission’s regulation of the provision of enhanced services by common carriers under its ancillary jurisdiction has been upheld.¹⁴⁵

The problem with the FCC’s reliance upon *Brand X* is that the sole question presented to the Supreme Court was whether the Commission appropriately classified the cable modem service as an information service under Title I; the Commission did not rely upon its ancillary jurisdiction in making that statutory classification determination, and the Supreme Court did not have before it a challenged exercise of ancillary jurisdiction.¹⁴⁶ *Brand X* simply will not take the Commission as far as it needs to go to justify the imposition of its proposed network neutrality rules on broadband ISPs.

The *Brand X* Court first observed that the Commission’s initial conclusion—that cable Internet service is an information service because it offers consumers “a comprehensive capability for manipulating information using the Internet via high-speed telecommunications”—was unchallenged.¹⁴⁷ At the same time, the Commission concluded that the cable Internet service was not a telecommunications service because although cable companies use telecommunications to provide consumers with Internet service, they do not offer the telecommunications element on a stand-alone basis.¹⁴⁸

The *Brand X* majority found that the FCC’s construction of the “information service” category as comprehending cable modem service was a reasonable policy choice. In the course of its decision, the *Brand X* majority rejected arguments that the Commission should have subjected the cable modem service to basic services (or “open access”) regulation analogous to that imposed on facilities-based enhanced services providers under the agency’s *Computer II* regulations, noting that the definition of “telecommunication service under the Act “says nothing

¹⁴⁴ FCC Brief in Support at 30-31.

¹⁴⁵ FCC Brief in Support at 31-32.

¹⁴⁶ *Brand X*, 545 U.S. at 968. In *Brand X*, the Court wrestled with the question of whether a cable company provides “telecommunications services” or “information services” under the Communications Act of 1934 and the Telecommunications Act of 1996. Under the 1996 Act, providers of “information services” are subject to much less strict regulation than providers of “telecommunications services.” *Id.*

¹⁴⁷ *Id.* at 987.

¹⁴⁸ *Id.*

about imposing more stringent regulatory duties on facilities-based information service providers;” rather, the definition hinges solely on whether the entity “offer[s] telecommunications for a fee directly to the public.”¹⁴⁹

Unquestionably, the sole issue presented to and decided by the Court in *Brand X* was “the proper regulatory classification under the Communications Act of broadband cable Internet service.”¹⁵⁰ Specifically, the question was: into which of the two relevant categories of regulated entities—telecommunications carriers or information service providers—do cable ISPs fit?¹⁵¹ After describing the mandatory obligations that attach to the telecommunications carrier classification under the Act, the *Brand X* Court simply observed that “[i]nformation-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction”¹⁵² This observation concerning the Commission’s ability to exercise ancillary jurisdiction over information service providers cannot be considered decisional.¹⁵³

Nor does the Court’s other statement “that ‘the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction,’”¹⁵⁴ either standing alone or in conjunction with the first, provide a basis for the exercise of ancillary jurisdiction over broadband ISP network management practices. At best, the *Brand X* majority’s observation about ancillary jurisdiction indicates that if presented with the issue, the Supreme Court likely would find FCC subject matter jurisdiction over facilities-based broadband Internet providers.¹⁵⁵

¹⁴⁹ *Id.* at 996.

¹⁵⁰ *Id.* at 975.

¹⁵¹ Although another statutory category relevant to the classification of Internet services provided by cable operators under the Act was “cable services,” both the FCC and the Court of Appeals for the Ninth Circuit had rejected such a classification and consequently the cable service classification was not presented to the *Brand X* Court as a possible choice. *See Id.* at 967; *Cable Modem Declaratory Ruling*, *supra* note 6, ¶¶ 31–33. *See generally* Esbin, *Internet Over Cable*, *supra* note 48 (discussing the appropriate classification of cable modem service before the FCC changed the classification).

¹⁵² *Brand X*, 545 U.S. at 976 (emphasis added). The observation, moreover, is contained in the opening background portion of the decision. *See id.* at 976–77.

¹⁵³ *Comcast P2P Order*, *supra* note 4, ¶ 14.

¹⁵⁴ *Id.* (quoting *Brand X*, 545 U.S. at 996).

¹⁵⁵ More importantly, the critical question of the FCC’s authority to act in a particular manner pursuant to its ancillary jurisdiction was expressly recognized by the *Brand X* majority to be an open question before the FCC

In short, the Supreme Court has not ruled upon the question whether any given regulation of facilities-based information service providers would be reasonably ancillary to the Commission's statutory responsibilities in a specific instance. All statements in *Brand X* concerning the FCC's ancillary jurisdiction to impose specific regulatory duties on facilities-based ISPs must be considered dicta.¹⁵⁶ Thus, *Brand X* should not be considered a basis of support for the Commission's authority to promulgate the extensive set of regulatory requirements set forth in the NPRM.

Justice Scalia's dissent in *Brand X* foreshadows potential limits on the FCC's use of the doctrine of ancillary jurisdiction to create whole new regulatory or non-regulatory schemes under the Act.¹⁵⁷ Justice Scalia criticized what he characterized as the FCC's attempt "to concoct" a "whole new regime of non-regulation ... through an implausible reading of the statute;" in so doing the Commission "exceeded the authority given it by Congress."¹⁵⁸ The FCC's approach to the cable Internet classification question, according to Justice Scalia, "mocks the principle that the statute constrains the agency in any meaningful way."¹⁵⁹ The dissent criticized the FCC for unacceptably turning "statutory constraints into bureaucratic discretions," by playing fast-and-loose with statutory definitions and potentially using its "undefined and sparingly used 'ancillary' powers" to then re-impose the very sorts of common carrier regulatory obligations it had attempted to avoid through its decision that cable Internet service was not a telecommunications service.¹⁶⁰ The dissent noted that although the *Cable Modem Declaratory Ruling* had contained a "self-congratulatory paean to its deregulatory largesse," the FCC had simultaneously sought comment on "whether, under its Title I jurisdiction [it] should require cable companies to offer other ISPs access to their facilities on common-carrier terms."¹⁶¹

in the Cable Modem Notice of Proposed Rulemaking which accompanied the *Cable Modem Declaratory Ruling*—no more, and no less. See *Brand X*, 545 U.S. at 996.

¹⁵⁶ While dicta may be cited in legal argument, it does not have the full force of legal precedent, as it was not part of the basis for the judgment. 20 Am. Jur. 2d Courts § 134 (2005).

¹⁵⁷ See *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1014.

¹⁶⁰ *Id.* at 1013–14.

¹⁶¹ *Id.* Justice Scalia went on to speculate that the FCC could use its ancillary powers to alter its conclusion that the definition of telecommunications carrier did not apply to cable Internet service, not by changing the law—its construction of the Title II definitions to exclude cable modem service from common carrier obligations—but by changing the underlying facts: "Under its undefined and sparingly used 'ancillary' powers, the Commission

Tellingly, the dissent observed that having concluded that cable ISPs, “are not providing ‘telecommunications services,’ there is reason to doubt whether it can use its [ancillary] powers to impose common-carrier-like requirements, since [section] 153(44) specifically provides that a ‘telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services,’ and ‘this chapter’ includes Titles I and II.”¹⁶²

The dissent’s views—albeit in the minority on the classification issue presented in *Brand X*—portend significant judicial review problems for any FCC attempt to impose common carrier-like non-discrimination obligations on facilities-based ISPs generally. Taken as a whole, not only does *Brand X* fail to support the Commission’s claims about its ancillary jurisdiction, the decision calls into question the Commission’s entire analysis of its statutory authority in the areas of information and Internet services.

d. Summary

Contrary to the Commission’s beliefs, the doctrine of ancillary jurisdiction is bounded and the Commission cannot expand its regulatory authority at will. Although the courts have repeatedly stated that the FCC has “broad authority” under this doctrine to carry out its statutory responsibilities, they have also recognized that the FCC’s ancillary authority is not unlimited.¹⁶³ *Southwestern Cable*, *Midwest Video I* and *Midwest Video II*,¹⁶⁴ taken together circumscribe the FCC’s ability to impose regulatory constraints on the vast array of communications falling under the FCC’s subject matter jurisdiction to actions necessary, if not imperative, to implementing or achieving express statutory mandates found in the substantive titles of the Act.¹⁶⁵

MPAA and *American Library Association* confirm that the Commission may rely on its necessary and proper-type powers under sections 4(i), 303(r), and, by implication, its rulemaking power under 201(b), only where Congress has delegated regulatory authority over an

might conclude that it can order cable companies to ‘unbundle’ the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be ‘offering’ telecommunications service! Of course, the Commission will still have the statutory power to forbear from regulating them under [section] 160 (which it has already tentatively concluded it would do). . . . Such Mobius-strip reasoning mocks the principle that the statute constrains the agency in any meaningful way.” *Id.* at 1014.

¹⁶² *Id.* at 1014 n.7.

¹⁶³ *Southwestern Cable*, 392 U.S. at 172; *Midwest Video II*, 440 U.S. at 698.

¹⁶⁴ *See Southwestern Cable*, 392 U.S. at 178; *Midwest Video I*, 406 U.S. 649; *Midwest Video II*, 440 U.S. 689.

¹⁶⁵ *See supra* Part III.B.1.a.

area to the agency, and that the delegation of some authority over an area does not confer upon the Commission plenary authority over that area.

The Commission's attempts to bolster its ancillary jurisdiction analysis through reliance on *Brand X* must flounder by virtue of the fact that the decision did not involve a challenge to an exercise of ancillary jurisdiction by the Commission, and therefore its statements concerning the doctrine must be considered dicta. Moreover, read as a whole, not only does *Brand X* fail to support the Commission's claims about its ancillary jurisdiction over these matters, the decision calls into question the Commission's analysis of its statutory authority in this area.

It is also evident from these cases that the doctrine of ancillary jurisdiction does not give the FCC liberty to claim plenary authority to regulate in a given area simply because Congress has endowed the agency with some authority in that area. Moreover, the few cases that have affirmed exercises of ancillary jurisdiction have done so only where they concerned adjuncts or auxiliary to a service that Congress explicitly authorized the agency to regulate. Although, as discussed in Part C.1.c, below, some of the decisions relied on by the FCC contain descriptive language suggesting that Title I alone may provide the basis for the FCC's ancillary authority, when examined closely, the facts and context of the cases reveal that ancillary jurisdiction has been and must be confined to matters that are so entwined with a service over which the Commission has been given explicit regulatory authority that it may be reasonably inferred that Congress intended to confer regulatory authority over those matters as part of its explicit grant of power.¹⁶⁶

The question thus remains as to whether the Commission may, as asserted in the NPRM, prescribe rules implementing what it has called "Federal Internet Policy" pursuant to the various statutory provisions it cites. Unfortunately, none of the provisions cited by the Commission in

¹⁶⁶ Joint Amicus Brief at 11. That all of the ancillary jurisdiction cases upholding the agency's actions involve such adjuncts is a demonstration of just how close a connection is required between any purported exercise of ancillary jurisdiction and the FCC's authority over regulated services. As the D.C. Circuit has observed, "substantial attention [must be devoted] to establishing the requisite 'ancillarity' between the Commission's authority over [the regulated service] and the particular regulation' imposed pursuant to its ancillary jurisdiction." Speta, et al. Joint Amicus Brief at 15 (*citing* *NARUC v. FCC*, 533 F.2d 601, 613 (D.C. Cir. 1976) (*NARUC II*)). In short, whatever the courts may have said in trying to describe ancillary jurisdiction, the actual cases show that it has been approved only where FCC regulation was an adjunct to its regulation of a service falling under either Title II or III. *Id.* at 11.

support of the proposed network neutrality rules can supply the necessary statutory “hook” on which its actions may rest.

C. The Provisions of the Communications Act Cited by the FCC Do Not Support Its Actions

The Commission relies principally on the “federal Internet policy set forth by Congress in section 230(b) of the Act, together with the broadband deployment goals that section 706(a) “charges the Commission with achieving,” and the FCC’s general grant of regulatory authority over wire and radio communications to support its authority to prescribe rules regulating the provision of broadband Internet services.¹⁶⁷ Additionally, the NPRM cites sections 1, 2, 257, 503 and 706(a).¹⁶⁸

The very brief recitation of the Commission’s statutory authority to prescribe rules to implement federal Internet policy pursuant to sections 230(b) and 706(a) in the NPRM is supplemented by reference, by the articulation of the Commission’s ancillary jurisdiction contained in the *Comcast P2P Order*, and its Brief in Support of that decision.¹⁶⁹ In that order, the Commission exerted regulatory control over the provision of broadband Internet access service and found that Comcast’s network management practices contravened federal policies aimed at protecting “the vibrant and open nature of the Internet.”¹⁷⁰ The Commission’s action rested exclusively on its claimed authority to directly “vindicate” and enforce what it termed “national Internet policy” against providers of broadband Internet access services, as articulated in its *Internet Policy Statement*, through an exercise of its ancillary jurisdiction, as in the NPRM.¹⁷¹ In effect, the Commission treated the four Internet policy principles as if they themselves were enforceable implementations of the “national Internet policy” contained in section 230(b) and the broadband deployment goals of section 706(a).¹⁷²

¹⁶⁷ NPRM ¶ 84.

¹⁶⁸ NPRM ¶¶ 51-53, 84, 175, 185; *see also* FCC Brief in Support at 7, 44-456. Section 503 establishes the FCC’s authority to assess forfeitures in appropriate cases involving broadcast station licensees, common carriers, and cable operators; it contains no provisions concerning providers of Internet or information services. 47 U.S.C. § 503.

¹⁶⁹ NPRM ¶ 83. See statement of Austin Schlick, General Counsel, FCC *supra* note 45 (asked what the statutory authority was for the just released NPRM, his response was “read our brief” in the *Comcast* case.).

¹⁷⁰ *Comcast P2P Order*, *supra* note 4.

¹⁷¹ *Id.* at ¶¶ 13-15; *see also id.* at 13090 (McDowell, Comm’r, dissenting); NPRM ¶¶ 83-86.

¹⁷² *See Undue Process*, *supra* note 45 at 24-27.

Consistent with this approach, the Brief in Support also claims that the source of the Commission’s ancillary jurisdiction to enforce “national Internet policy” is sections 230(b) and 706(a).¹⁷³ More broadly, it argues that Congress created the FCC “for cases such as this one,” granting it broad authority to keep pace with dynamically developing technologies such as the Internet, and that unless the Commission regulates network management practices of a broadband ISP such as Comcast, its regulatory goals for virtually every sector of communications media, from the Internet, to cable and broadcast television, to voice communications could be undermined.¹⁷⁴

The Brief in Support argues that the Commission may exercise its ancillary jurisdiction in “promotion and protection ‘of objectives for which the Commission has been assigned jurisdiction,’” and in furtherance “of the achievement of long established regulatory goals’ in those areas.”¹⁷⁵ The Brief argues further that the ancillary regulatory action taken in the *Comcast P2P Order* furthers numerous “regulatory goals based in the Communications Act,” including principally section 230(b), where Congress set forth various “polic[ies] of the United States” regarding the Internet, including a policy of maximizing user control over the receipt of Internet content,” and “encourage[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability” pursuant to section 706(a) of the 1996 Act because network management practices that include blocking of some Internet traffic, “if left unchecked ... would reduce consumer demand for, and thus deployment of, high speed communications services and facilities.”¹⁷⁶

Even more broadly, the Brief in Support asserts that the Commission has ancillary jurisdiction over the network management practices of a broadband ISP “by virtue of its regulatory authority over broadcast radio and television, cable services and telephony, [pursuant to Titles II, III, and VI], and that the FCC has ancillary jurisdiction by virtue of a duty imposed by Title I itself, which places on the agency a responsibility to ensure a communications system with reasonable prices.”¹⁷⁷

¹⁷³ FCC Brief in Support at 19.

¹⁷⁴ *Id.* at 19-20, 30.

¹⁷⁵ *Id.* at 32-33 (citing *Midwest Video I*, 406 U.S. 649).

¹⁷⁶ *Id.* at 21, 36-42.

¹⁷⁷ *Id.* at 22, 43-50.

Whether considered individually or together, none of the provisions cited in the NPRM, discussed in the *Comcast P2P Order*, or the Brief in Support provide the requisite regulatory authority for the proposed network neutrality rules. As demonstrated below, sections 230(b), 706(a) and 1 cannot serve as a basis for promulgating behavioral binding rules for Internet service providers because these provisions are nothing more than Congressional policies—hortatory exclamations or statements of broad purpose—to guide the FCC in carrying out the explicitly delegated regulatory authority Congress placed elsewhere in the Act.¹⁷⁸ Even if they could provide a basis for regulatory action, the rules proposed in the NPRM would impermissibly contravene, rather than further, the congressional policies and statutory goals contained in sections 230(b) and 706(a). Nor can the other specific provisions cited by the NPRM, sections 201(b) or 257, provide the necessary jurisdictional reference as they bear no reasonable relationship to the broadband network management practices that the Commission would regulate under its proposed network neutrality rules, and otherwise fail to enlarge the scope of the FCC’s existing jurisdiction over providers of broadband information services.

The Commission’s exercise of looking for hints of authority scattered throughout the Act should be strong indicators to the Commission that Congress did not actually delegate it the authority to make law—create binding legal norms—governing the provision of Internet services. Had Congress intended the FCC to regulate Internet services, it would have clearly delegated the agency such authority in the form of explicit statutory commands, rather than cryptic references hidden obliquely in the interstices of the Act.¹⁷⁹ “Congress,” the Supreme Court has said, “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions - it does not, one might say, hide elephants in mouseholes.”¹⁸⁰

¹⁷⁸ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 n.18 (1981) (explaining that findings in a statute were “merely an expression of federal policy” that were “hortatory, not mandatory”); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 297 (D.C. Cir. 1975) (referring to section 396(g) of the Communications Act as a “guide to Congressional oversight policy and as a set of goals ... not a substantive standard, legally enforceable by agency or courts,” also referred to as “this hortatory language.”).

¹⁷⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (“The importance of the issue ... makes the oblique form of the claimed delegation all the more suspect.”)

¹⁸⁰ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

1. Statutory Provisions Establishing Only Broad Policies or Purposes Cannot Support the Exercise of Ancillary Jurisdiction to Regulate Behavior

Sections 230(b), 706(a), and 1 set forth only regulatory purposes or policy goals to be furthered through the exercise of the Commission's expressly delegated statutory duties contained elsewhere.¹⁸¹ Contrary to the Commission's claims, they cannot be construed to establish statutorily mandated responsibilities.¹⁸² No precedent exists for permitting the FCC to exercise its ancillary authority to impose affirmative regulatory obligations pursuant to the various policy statements contained in the Act as opposed to operative regulatory provisions. Such quasi-legislative actions, in the absence of a clear delegation of regulatory authority to the FCC from Congress, must be considered *ultra vires*. Even if sections 230(b) and 706(a) could theoretically support an exercise of ancillary jurisdiction, the particular rules proposed in the NPRM are inconsistent with, and therefore cannot be considered reasonably ancillary to, the policies and purposes contained in these provisions.

a. Section 230(b) States a Policy of Non-regulation of the Internet

The NPRM asserts that, consistent with the *Comcast P2P Order*, the network neutrality rules will ensure that users can send and receive the content of their choice, run applications and use services of their choice, and connect their choice of legal devices that do not harm the network.¹⁸³ In each case, Section 230(b) is the FCC's first and most important landfall in its odyssey to locate the source of regulatory authority over Internet services.¹⁸⁴

The Commission claimed that its jurisdiction was ancillary to the effective performance of its responsibility for "the national Internet policy enshrined in section 230(b) of the Act."¹⁸⁵ The *Comcast P2P Order* states:

When Congress drafted a national Internet policy in 1996, it did not do so on an empty tablet. Instead, Congress inscribed these policies into section 230 of the Communications Act—the very same Act that established this Commission as the federal agency entrusted with "regulating interstate and foreign commerce in communication by wire." As Congress was no doubt aware, section 1 of the Act requires the Commission to "execute and enforce provisions of [the] Act." To

¹⁸¹ See 47 U.S.C. §§ 157(a), 230(b), 521(4) (2000).

¹⁸² FCC Brief in Support at 20-22, 38-39, 40-41, 46-50.

¹⁸³ NPRM ¶¶ 83-84; see also *Comcast P2P Order*, *supra* note 4, ¶¶ 92-93.

¹⁸⁴ NPRM ¶¶ 51-55, 83-84, 93; see *Comcast P2P Order*, *supra* note 4, ¶¶ 12-15.

¹⁸⁵ *Comcast P2P Order*, *supra* note 4, ¶ 15.

carry out this responsibility, section 4(i) empowers the Commission to “issue such orders ... as may be necessary in the execution of its functions.” Given section 230’s placement within the Act, we think that the Commission’s ancillary authority to take appropriate action to further the policies set forth in section 230(b) is clear.¹⁸⁶

In other words, regardless of the purpose of the operative provisions crafted by Congress and placed in section 230, the rationale of the *Comcast P2P Order* appears to be that the FCC may take any action pursuant to its section 4(i) authority that it finds appropriate to “further the policies set forth in section 230(b).”¹⁸⁷ According to the FCC’s Brief in Support, Congress “delegated authority to the FCC in the form of broad policy outlines rather than a set of easily outdated commands,” in view of the “breadth and pace of change in Internet technology.”¹⁸⁸ This view of the FCC’s authority under section 230(b) as wholly discretionary and open-ended is as extraordinary as it is untenable.

First, section 230(b) is more convincingly understood to stand for precisely the opposite proposition: that the FCC is prohibited from regulating the terms and conditions of the provision of Internet access services.¹⁸⁹ Second, the tools Congress created to implement the policies contained in section 230(b) are limited to civil immunity from damages for service providers and users that restrict access to certain objectionable material.¹⁹⁰ There is no gap in these provisions for the Commission to fill by regulating the network management practices of facilities-based ISPs. Lastly, acceptance of the FCC’s view of the statute would be akin to finding that the agency has plenary authority over the Internet and the provision of interactive computer services simply because it possesses some authority in the area, a proposition roundly rejected by the courts.¹⁹¹

¹⁸⁶ *Id.* (citations omitted). The argument is essentially repeated in the FCC’s Brief in Support, where it avers that section 230(b) declares the “legislative will” of Congress “in the form of a policy, along with an express grant of authority to the FCC to perform all actions necessary to ‘execute and enforce’ all of the ‘provisions’ of the Communications Act.” FCC Brief in Support at 39 (quoting 47 U.S.C. §§ 151, 154(i)).

¹⁸⁷ *Comcast P2P Order*, *supra* note 4, ¶ 15.

¹⁸⁸ FCC Brief in Support at 39.

¹⁸⁹ As introduced, the legislation that ultimately became the 1996 Act explicitly stated that “[n]othing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services.” 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (section (d) of amendment number 2-3 offered by Mr. Cox of California).

¹⁹⁰ See 47 U.S.C. § 230(c) (2000) (granting immunity for interactive computer service providers from suit under libel laws).

¹⁹¹ See *American Library Association*, 406 F.3d at 708.

To the extent section 230(b) embodies national Internet policy, that policy expressly directs government to refrain from imposing new Internet regulations.¹⁹² Although the FCC has previously cited section 230(b) for its un-regulatory thrust in a variety of proceedings, it has not relied upon the provision as explicit authority for regulating the Internet or providers of interactive computer services.¹⁹³ The *Comcast P2P Order* was the first order in which the Commission interpreted section 230 as directly supporting regulatory action against a private party.¹⁹⁴

¹⁹² See Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. § 2 (1995). The Internet Freedom and Family Empowerment Act was the precursor to the language ultimately adopted in section 230.

¹⁹³ For example, when the FCC declined to allow local exchange carriers to assess interstate per-minute access charges on ISPs, it cited section 230. *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, ¶ 344 (May 7, 1997). The FCC also declined to regulate peering relationships between Internet backbone providers because it recognized that premature regulation “might impose structural impediments to the natural evolution and growth process which has made the Internet so successful.” *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, ¶ 105 (Jan. 28, 1999) (citing Comments of SBC Commun. Inc., at 12). In its declaratory ruling classifying cable modem service as an information service, the FCC quoted section 230 for the overarching principle of seeking “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” *Cable Modem Declaratory Ruling*, *supra* note 6, ¶ 4 (quoting 47 U.S.C. § 230(b)(2) (2000)). It further stated that it was “mindful of the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market.” *Id.* ¶ 73. The FCC also cited section 230 in two orders preempting state regulation of VoIP services. *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶ 35 (Nov. 9, 2004) (*Vonage Order*); *In re Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 18 (Feb. 12, 2004). As recently as 2004, the Commission referred to “Congress’s clear intention, as expressed in the 1996 Act, that [information services] remain ‘unfettered’ by federal or state regulation” and its own “hands-off” approach to the Internet. *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 39 (Feb. 12, 2004) (*IP-Enabled Services NPRM*).

¹⁹⁴ The *Internet Policy Statement* adopted in August 2005 was the first instance in which the FCC claimed that section 230 gave it authority to impose regulations against ISPs. That document was not an order, and contemporary statements of FCC Commissioners clearly indicate that it was not enforceable. See, e.g., Kevin Martin, Acting FCC Chairman at the time of the *Comcast P2P Order* stated upon the adoption of the *Internet Policy Statement* three years earlier that “policy statements do not establish rules nor are they enforceable documents.” News Release, Fed. Comm’n’s Comm’n, Chairman Kevin J. Martin Comments on Commission Policy Statement (Aug. 5, 2005) [hereinafter *Martin Statement*]. This understanding is further reflected in the subsequent *Broadband Industry Practices Inquiry*, where the Commission again hypothesized that it possessed ancillary jurisdiction to “adopt and enforce the net neutrality principles announced in the *Internet Policy Statement*,” but then sought comment on the critical question whether it in fact has “the legal authority to enforce the Policy Statement.” *Broadband Industry Practices Inquiry*, *supra* note 6 ¶¶ 4, 10.

Section 230's operative provisions—subsections (c) and (d)—create protection for Good Samaritan blocking and screening of offensive material by interactive computer service users and providers, and impose content filtering and notice obligations on providers of interactive computer services.¹⁹⁵ Section 230(c) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁹⁶ The sole obligation imposed on providers of interactive computer services in section 230 is the obligation to provide notice to their customers of available parental controls so that parents may block objectionable content.¹⁹⁷

Nowhere does section 230 grant authority to the FCC to impose regulations on broadband ISPs or other providers of Internet services. Nor does the legislative history support the Commission's belief that by placing section 230 in the Act, Congress delegated to the Commission roving authority to develop rules and regulations to implement the policies contained in section 230(b).¹⁹⁸ To the contrary, not only did the drafters of section 230 “not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet,”¹⁹⁹ they gave the FCC no express role in implementing its provisions.²⁰⁰ To the extent that section

¹⁹⁵ See 47 U.S.C. § 230(c)–(d) (2000).

¹⁹⁶ 47 U.S.C. § 230(c)

¹⁹⁷ 47 U.S.C. § 230(d).

¹⁹⁸ See 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The Commission's strained attempt to read the provision as supporting its action on the ground that section 230's emphasis is on “‘maximiz[ing] user control’ and ‘empowering parents’” and its claims that its action against Comcast furthers user control over the content received by means of Internet connections is unpersuasive. See *Comcast P2P Order*, *supra* note 4, ¶ 15 n.69. The primary object of the statute is to establish civil immunity from damages for “good Samaritan” blocking and screening of offensive material provided over the Internet by another information content provider, without the need for additional regulatory involvement in Internet content regulation. Section 230(c) and (d) implement the policies contained in subsection (b) by means of limiting Internet service provider liability for third party content and requiring providers to disclose to users the existence of available parental controls, not by regulating the network management practices of Internet service providers. The Commission's view that it is unconstrained in its ability to add to Congress' chosen means of implementing the policies contained in section 230(b) by imposing new regulatory restraints on Internet service providers is simply wrong.

¹⁹⁹ 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

²⁰⁰ The Commission relies on one of its own prior orders claiming that by “codifying its Internet policy in the Commission's organic statute, Congress charged the Commission with ongoing responsibility to advance that policy consistent with our other statutory obligations” in support of its ancillary jurisdiction to “enforce federal policy” and regulate broadband network management practices. *Comcast P2P Order*, *supra* note 4, ¶ 12 n.45, ¶ 15 n.69 (quoting *Vonage Order*, *supra* note 193, ¶ 35). In the *Vonage Order*, the Commission stated that “[w]hile [it] acknowledge[s] that the title of section 230 refers to ‘offensive material’ the general policy statements regarding the Internet and interactive computer services contained in the section are not similarly confined to offensive material.”). Notwithstanding the statements contained in the *Vonage Order*, the

230 speaks to any regulatory mandate for the FCC, it is solely to preclude the agency—or anyone else—from treating “the provider or user of an interactive computer service as the publisher or speaker of any information provide by another information content provider.”²⁰¹ Even assuming arguendo the Commission is correct that by placing the radically deregulatory section 230 in the Act, Congress was somehow charging the agency “with ongoing responsibility to advance that policy consistent with [its] other statutory obligations,” there remains a significant distinction between advancing overarching policy goals and promulgating a ruling concerning broadband network management practices that has the force of law.²⁰² And it is evident from the legislative history that Congress did not contemplate the latter role for the Commission in enacting section 230.

i. The Legislative History of Section 230 Indicates an Affirmative Congressional Intent to Keep the Internet Unfettered by FCC Regulation

On February 1, 1995, Senators Exon (D-NE) and Gorton (R-WA) introduced S. 314, the Communications Decency Act (“CDA”).²⁰³ This bill would have made it a crime to send any material objectionable to minors between any two computers connected to the Internet.²⁰⁴ When the Telecommunications Act of 1995 was introduced in the Senate in March 1995, the CDA was attached to it.²⁰⁵

On June 30, 1995, Representatives Christopher Cox (R-CA) and Ron Wyden (D-OR) introduced H.R. 1778, the Internet Freedom and Family Empowerment Act²⁰⁶ in response to the CDA, which Wyden believed was “doomed to fail because their idea of a Federal Internet Police will make the Keystone Cops look like Cracker Jack crime fighters.”²⁰⁷ In August, the Cox-

Commission may not enlarge its statutory authority at will by finding that the provision of some authority in an area gives it plenary authority over that subject matter. *See American Library Association*, 406 F.3d at 708; *see also MPAA*, 309 F.3d at 804–06.

²⁰¹ 47 U.S.C. § 230(c)(1) (2000).

²⁰² *Comcast P2P Order*, *supra* note 4, ¶ 15 n.69.

²⁰³ *See* Communications Decency Act of 1995, S. 314, 104th Cong.

²⁰⁴ *See id.* § 2.

²⁰⁵ Robert Cannon, The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway, <http://www.law.indiana.edu/fclj/pubs/v49/no1/cannon.html> (last accessed Jan. 11, 2009).

²⁰⁶ *See* Internet Freedom and Family Empowerment Act, H.R. 1778, 104th Cong. (1995).

²⁰⁷ 141 CONG. REC. H8287 (daily ed. Aug. 2, 1995) (statement of Sen. Wyden).

Wyden bill was amended to the House's version of the 1996 Act.²⁰⁸ When introducing the amendment, Rep. Cox explained it as follows:

Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. ... Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. ... We want to help [the Internet] along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.²⁰⁹

The Cox-Wyden amendment was approved and the House passed its version of the 1996 Act.²¹⁰ When the House and Senate met to reconcile the different versions of the Act, the Senate version contained the CDA and the House version contained the Internet Freedom and Family Empowerment Act.²¹¹ It was believed that only one of the two plans would survive in the final version of the 1996 Act.²¹² Surprisingly, both plans were included, but the explicit limitation on FCC regulation proposed by the Cox-Wyden amendment was eliminated.²¹³ On the same day that President Clinton signed the 1996 Act,²¹⁴ the American Civil Liberties Union ("ACLU") and Electronic Privacy Information Center ("EPIC") filed a lawsuit arguing that the CDA was unconstitutional.²¹⁵ On June 26, 1997, on appeal from a lower court ruling, the Supreme Court

²⁰⁸ 141 CONG. REC. H8450 (daily ed. Aug. 4, 1995).

²⁰⁹ 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995).

²¹⁰ H.R. 1555, A0004, 104th Cong., 141 CONG. REC. 21999, 22054, 22083–84 (1995).

²¹¹ See Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. L. & TECH. 569, 595–96 (2001).

²¹² See *Congressman Cox and Wyden Demonstrate New Internet Blocking Technologies*, CNET, July, 17, 1995, http://findarticles.com/p/articles/mi_m0EIN/is_ai_17278694; Centr. for Democ. and Tech., The Communications Decency Act: Legislative History (Jan. 8, 2007), <http://opt-out.cdt.org/speech/cda/cda.shtml>.

²¹³ See Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 164, 174 (2006).

²¹⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (enacted Feb. 8, 1996); see Guy Lamolinara, *Wired for the Future: President Clinton Signs Telecom Act at LC*, Information Bulletin (Feb. 19, 1996), <http://www.loc.gov/loc/lcib/9603/telecom.html>.

²¹⁵ *Reno v. ACLU*, 521 U.S. 844, 849, 861 (1997).

ruled that the CDA was overly broad and vague in its definitions of the types of Internet communications it criminalized, but section 230 survived.²¹⁶

In view of this legislative history, it is apparent that section 230 was intended to set forth a policy of non-regulation or un-regulation of the Internet and Internet services generally, and to create a shield against publisher or speaker liability on the part of ISPs for third-party content.²¹⁷ The goal of section 230 was to empower parents and individuals—and not the government—to set controls to deal with material they found objectionable on the Internet.²¹⁸ The key finding in section 230 with respect to Internet service regulation, subsection (a)(4), states “The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”²¹⁹ It follows then, as expressed in section 230(b)(2), that Congress declared it to be the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²²⁰

ii. The FCC’s Interpretation of Section 230 Cannot Stand

As clear as the legislative history is, in the *Comcast P2P Order* the FCC rejected arguments advanced by Comcast that section 230(b)(2) embodies the “clear intent of Congress that the Internet not be regulated” and that it deprives the Commission of legal authority to adjudicate the dispute over Comcast’s network management practices.²²¹ According to the Commission, this argument placed “too much weight on the last few words of this federal policy.”²²² The Commission advanced two reasons for its position. First, the policy embodied in

²¹⁶ See *id.* at 885.

²¹⁷ See Jason Oxman, The FCC and the Unregulation of the Internet 24 (FCC Office of Plans and Policy, Working Paper No. 31, 1999), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.doc (describing 30 years of FCC policy decisions concerning computer applications that created the deregulatory environment in which the Internet could flourish).

²¹⁸ See, e.g., 47 U.S.C. § 230(a), (c) (2000).

²¹⁹ 47 U.S.C. § 230(a)(4) (emphasis added).

²²⁰ 47 U.S.C. § 230(b)(2).

²²¹ *Comcast P2P Order*, *supra* note 4, ¶ 24.

²²² *Id.* The FCC’s Brief in Support acknowledges that section 230(b) states several potentially conflicting policies, while maintaining that the Commission “may decide how much precedence particular policies will be granted when several are implicated in a single decision.” Brief in Support at 39-40 (*citing Mobile Tel. Inc. v. FCC*, 107 F.3d 888, 895 (D.C. Cir. 1997)). Nonetheless, “the five policy statements in section 230(b) are just that – mere statements of policy and not law. Even then, they are so vague as to be purely atmospheric if not altogether meaningless as guides for affirmative regulatory action.” Joint Amicus Brief at 16.

section 230 “cannot reasonably be read to prevent *any* governmental oversight of providers of broadband Internet access services.”²²³ Second, the Commission has previously rejected an interpretation of section 230(b)(2) that would “place a flat-out ban on any government action that might affect the Internet and the market for broadband Internet access services.”²²⁴

The Commission first observed that section 230(b)(2) discusses preservation of the “market that presently exists for the Internet and other interactive services,” a market that substantially consisted at the time of passage of the 1996 Act of dial-up Internet access services provided over regulated telephone networks.²²⁵ From this, the Commission argued that “[i]t is inconceivable that Congress was unaware of or intended to eliminate this regulatory framework given its stated purpose of ‘preserv[ing] the vibrant and competitive free market.’”²²⁶ There are several problems with this analysis.

The fact that the FCC regulated the common carrier provision of basic telecommunications services utilized for dial-up access to the Internet in 1996 is irrelevant to the Congressional statement of policy that the free market that then existed for “the Internet and other interactive computer services,” which include Internet access services, be preserved. The Commission itself has long classified the types of data processing services provided by ISPs as enhanced or information services for the express purpose of keeping them free from Title II regulation.²²⁷ As the Commission has found, the provision of telecommunications services and information services under the Act are mutually exclusive.²²⁸ Cable modem services were just being developed in 1996 and have since become widely adopted: yet they have never successfully been subjected to common carrier regulation at either the federal, state, or local level.²²⁹ Through its choice of language in section 230(b)(2), Congress sought to preserve the

²²³ *Comcast P2P Order*, *supra* note 4, ¶ 25.

²²⁴ *Id.* ¶ 26.

²²⁵ *Id.* ¶ 25.

²²⁶ *Id.* (quoting 47 U.S.C. § 230(b)(2) (2000)).

²²⁷ *See Computer II Final Decision*, *supra* note 55, ¶¶ 5, 7; *CCIA*, 693 F.2d at 207; *see also Oxman*, *supra* note 217, at 24.

²²⁸ *In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 13 (Apr. 10, 1998).

²²⁹ Attempts by local franchising authorities to subject cable modem services to various “open access” requirements were ultimately overturned by the courts. *See Cable Modem Declaratory Ruling*, *supra* note 6, ¶¶ 75, 96, 98; *Brand X*, 545 U.S. at 1002–03; *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879–80 (9th Cir. 2000); *see also* Barbara Esbin & Gary Lutzker, *Poles, Holes and Cable Open Access: Where the Global*

free market for the provision of such enhanced or information services as those provided by ISPs. Once the Commission itself classified facilities-based Internet access service provided by cable operators as information services, they too fell under the ambit of this Congressional policy.

In reaching its decision in the *Comcast P2P Order*, the Commission relied on its own prior—and un-reviewed—orders finding that section 230(b)(2) did not preclude its imposition of local number portability, telephone consumer privacy protections, and 911 service obligations on providers of interconnected Voice-over-Internet Protocol (VoIP) service.²³⁰ VoIP providers utilize IP-based networks to provide services that are functionally equivalent to traditional circuit-switched voice services.²³¹ The Commission’s view that section 230(b)(2) should not be read to bar its regulation of the provision of interconnected VoIP or E911 services is not dispositive.²³² VoIP is an application that may or may not be provided over the Internet. Its close connection to voice telephony services that fall within the FCC’s expressly delegated authority over common carriers sets VoIP providers apart from providers of broadband Internet services. The fact that section 230(b)(2) does not, as the FCC has stated, impose a “flat-out ban

Information Superhighway Meets the Local Right-of-Way, 10 COMMLAW CONSPECTUS 23, 28–29 (2001) (discussing attempts by local franchising authorities to impose cable open access on cable operators as franchising requirements).

²³⁰ *Comcast P2P Order*, *supra* note 4, ¶ 26 (citing *In re Telephone Number Requirements for IP-Enabled Services Providers*; *Local Number Portability Porting Interval and Validation Requirements*; *IP-Enabled Services*; *Telephone Number Portability*; *CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*; *Final Regulatory Flexibility Analysis*; *Numbering Resource Optimization*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, ¶ 29 n.101 (Oct. 31, 2007)); *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*; *IP-Enable Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, ¶ 59 n.188 (Mar. 13, 2007); *In re IP-Enabled Services*; *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 29 n.95 (May 19, 2005) (*VoIP E911 Order*). For a criticism of this exercise of ancillary jurisdiction see Susan Crawford, *The Ambulance, The Squad Car, & The Internet*, 21 BERKELEY TECH. L.J. 873, 928–29 (2006).

²³¹ VoIP “is a technology that allows you to make voice calls using a broadband Internet connection instead of a regular (or analog) phone line.” Fed. Comm’n’s Comm’n, *IP-Enable Services*, <http://www.fcc.gov/voip/> (last visited Jan. 16, 2009).

²³² As defined by the Commission, “[t]he term ‘interconnected’ refers to the ability of the user generally to receive calls from and terminate calls to the public switched telephone network ... including commercial mobile radio services ... networks.” *VoIP E911 Order*, *supra* 230, ¶ 1 n.1.

on any government action” in this area fails to demonstrate that the provision thereby permits any particular action.²³³

In addition to the issues identified above, regulating the network management practices of ISPs is unrelated to the operative provisions of section 230 concerning offensive material, parental controls, and intermediary liability for third party content.²³⁴ Commission regulation of the provision of Internet services cannot even be considered *relevant*, let alone *imperative*, to the effective implementation of section 230(b). Moreover, it is plainly antithetical to the policy expressed in section 230(b)(2) that the Internet and interactive computer services such as the services provided by Comcast remain unfettered by Federal regulation. Regulating the network management practices of ISPs, therefore, cannot be considered reasonably ancillary to section 230(b).

Finally, an exercise of ancillary jurisdiction cannot be inconsistent with provisions of the Act.²³⁵ At the same time that Congress declared it to be the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation,” it defined “interactive computer services” to include “any information service” that “provides access to the Internet.”²³⁶ Commission regulation of the provision of broadband Internet access services cannot be “reasonably ancillary” to a statutory provision that declares it to be the policy of the United States that such information services remain “unfettered” by Federal regulation. For all of the above reasons, the Commission may not rely upon section 230(b) to support its proposed regulation of the provision of Internet and interactive computer services.

b. Section 706(a) States Statutory Goals Rather Than Regulatory Powers

The NPRM asserts that the proposed rules will advance “the broadband goals that section 706(a) of the Telecommunications Act of 1996 charges the Commission with achieving.”²³⁷

²³³ *Comcast P2P Order*, *supra* note 4, ¶ 26.

²³⁴ 47 U.S.C. § 230(b)(4) (2000).

²³⁵ *Midwest Video I*, 406 U.S. at 662 (“the Commission does have jurisdiction ... reasonably ancillary to the effective performance of [its] various responsibilities ... [and] may, for these purposes, issue such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*”) (internal punctuation omitted; emphasis added); *see also* 47 U.S.C. § 154(i), 47 U.S.C. § 303(r).

²³⁶ 47 U.S.C. § 230(b)(2) & (f)(2).

²³⁷ NPRM ¶ 84; 47 U.S.C. § 1302(a).

Section 706 is entitled “Advanced Telecommunications Incentives.”²³⁸ As the Commission recognizes, section 706(a) provides that the “Commission shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”²³⁹ Section 706(a) further provides that the Commission is to pursue this policy by “utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”²⁴⁰ Congress defined advanced telecommunications capability as “high-speed, switched broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology” and “without regard to any transmission media or technology.”²⁴¹

Apart from its responsibility to encourage the deployment of advanced telecommunications capability by utilizing various deregulatory or regulating methods that “remove barriers to infrastructure investment,” the Commission’s sole statutory mandate pursuant to section 706 is to conduct a regular inquiry concerning the availability of advanced telecommunications capability to all Americans in a reasonable and timely fashion. Only upon a negative finding which the Commission has never made, is the Commission empowered to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”²⁴²

In the *Comcast P2P Order*, the FCC found that regulation of Comcast’s network management practices was reasonably ancillary to this provision. The practice of degrading consumer ability to share or access video content, according to the FCC, would effectively result

²³⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (codified at 47 U.S.C. § 157 note (2000)).

²³⁹ *Comcast P2P Order*, *supra* note 4, ¶ 18; 47 U.S.C. § 157(a) (2000). Section 706 was added as a footnote to section 157, contained in Title I of the Act, by the Telecommunications Act of 1996. Section 157, entitled “New Technologies and Services,” states that it “shall be the policy of the United States to encourage the provision of new technologies and services to the public.” § 157(a). The Commission is directed to determine “whether any new technology or service proposed in a petition or application is in the public interest within one year” of filing, and to conclude any proceeding for a new technology or service that the Commission itself initiates within one year. § 157(b). Section 706 of the Act was moved to its own section of the code in December 2008. 47 U.S.C.A. § 1302 (West 2008).

²⁴⁰ Pub. L. No. 104-104, § 706(a).

²⁴¹ 47 U.S.C. § 706(c); *see Comcast P2P Order*, *supra* note 4, ¶ 18.

²⁴² 47 U.S.C. § 706(b).

in the limiting of “deployment” of an “advanced telecommunications capability” and predicted that “prohibiting network operators from blocking or degrading consumer access to desirable content and applications on-line will result in increased consumer demand for high-speed Internet access and, therefore, increased deployment to meet that demand.”²⁴³

It is evident that section 706(a) provides only a “general instruction to the FCC” to promote broadband deployment.²⁴⁴ This Congressional policy—as the Supreme Court has described it—is not an independent grant of substantive regulatory power.²⁴⁵ Accordingly, the FCC cannot assert ancillary jurisdiction solely to promote the goals of section 706(a) because that provision does not grant any authority or impose any specific mandatory obligation on the Commission, as the agency itself has previously recognized:

[S]ection 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including forbearance authority granted under section 10(a), to encourage the deployment of advanced services.²⁴⁶

As discussed above, the Commission may not rely on its ancillary jurisdiction simply because an action may be said to further a “valid communications policy goal and [is] in the public interest.”²⁴⁷ Rather, the Commission must support regulation pursuant to its ancillary jurisdiction actions as necessary, if not imperative, to effectuate a specific delegated regulatory responsibility, and the action must support long established regulatory goals in the area of regulation relied upon.²⁴⁸ The D.C. Circuit has stated that statutory provisions that “order[] the Commission to produce a report” do “nothing more, nothing less” and that “[o]nce the

²⁴³ *Comcast P2P Order*, *supra* note 4, ¶ 18.

²⁴⁴ *See Petition of Free Press, et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* Ex Parte Communication of Free Press, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52, 20–24 (June 12, 2008) [hereinafter *Free Press June 12 Ex Parte*].

²⁴⁵ *Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power*, 534 U.S. 327, 339 (2002).

²⁴⁶ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24047 ¶ 69 (1998).

²⁴⁷ *MPAA*, 309 F.3d at 806. Although the D.C. Circuit has recently found that “the general and generous phrasing of § 706 means that the FCC possesses significant . . . authority and discretion to settle on the best regulatory or deregulatory approach to broadband,” this does not also suggest that the FCC can enlarge the scope of its regulatory authority in its sole discretion. *See Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-907 (D.C. Cir. 2009). *Ad Hoc* was itself a forbearance case, and the court did not hold that section 706 imposes specific regulatory responsibilities on the FCC.

²⁴⁸ *Midwest Video I*, 406 U.S. at 663–65; *see supra* Part III.A.1.b.

Commission complete[s] the task of preparing the report ... its delegated authority on the subject end[s].”²⁴⁹ Thus, consistent with the D.C. Circuit’s decision in *MPAA*, once the FCC discharges its obligation to conduct its periodic inquiries and produce the required reports to Congress pursuant to section 706(b), “its delegated authority on the subject end[s].”²⁵⁰ Section 706 may continue to serve as a guidepost for FCC regulatory actions, but standing alone, it may not provide the hook for its regulation of Internet services.

Moreover, an exercise of ancillary jurisdiction must not be contrary to statutory limits on the scope of agency authority, nor may it be contrary to long-established policy in the area of advanced telecommunications deployment.²⁵¹ The FCC has long pursued a deregulatory policy with respect to section 706 for the express purpose of “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” focused on spurring infrastructure investment.²⁵² By exercising regulatory authority to dictate the network management policies of facilities-based broadband ISPs—a move that will likely deter rather than encourage infrastructure investment—the FCC both contravenes the statutory purpose and reverses its own long-standing policy objectives.²⁵³

c. Section 1 Is Not a Stand-Alone Source of Regulatory Authority

Although section 1 is not discussed in the statutory authority section of the NPRM, it is cited as the basis for one of the “Commission Goals” to be furthered by the network neutrality rules, and as a legal basis for the proposed rules in the NPRM’s Ordering Clauses and Appendices.²⁵⁴ Section 1 does not directly govern any specific activity; it is one of ten general provisions of Title I that articulate the broad purposes of the Act and establishes its overarching goals. Specifically, section 1 provides the reasons for the Communications Act: “For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as

²⁴⁹ *MPAA*, 309 F.3d at 807.

²⁵⁰ *Id.*

²⁵¹ *See Midwest Video II*, 440 U.S. at 706–07.

²⁵² 47 U.S.C. § 157(a) note (2000); *see e.g., Cable Modem Declaratory Ruling*, *supra* note 6, ¶¶ 4, 47, 73; *Wireline Broadband Order*, *supra* note 6, ¶ 77.

²⁵³ By imposing additional obligations on broadband providers based on weak legal grounds, the Commission increases the uncertainty in the market, thereby discouraging additional investment. *See* Barbara Esbin, The Progress & Freedom Foundation, *Net Neutrality: A Further Take on the Debate*, Progress on Point No. 16.26 (Dec. 2009), <http://www.pff.org/issues-pubs/pops/2009/pop16.26-net-neutrality-further-take-on-debate.pdf>.

²⁵⁴ NPRM ¶¶ 51, 185.

to make available, so far as possible ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,” and the creation of the Commission “for the purpose of ... centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication”²⁵⁵ In the *Comcast P2P Order*, the FCC reasoned that its action was reasonably ancillary to this delegation of authority because “prohibiting unreasonable network discrimination directly furthers the goal of making broadband Internet access service both ‘rapid’ and ‘efficient’”; and “exercising jurisdiction over the complaint ... promote[s] the goal of achieving ‘reasonable charges.’”²⁵⁶

The Commission also relied heavily on its authority pursuant to section 1 of the Act in the *Comcast P2P Order*.²⁵⁷ The FCC’s Brief in Support represents that the Commission views Title I as a “stand-alone source of authority over broadband ISP network management practices.”²⁵⁸ The Brief argues that the Supreme Court in *Southwestern Cable* has recognized “that section 1 imposes ‘responsibilities’ on the FCC that the agency is ‘required to pursue.’”²⁵⁹ While this is no doubt true, the Supreme Court has never said that the FCC has unlimited ancillary regulatory authority under section 1 of the Act.

²⁵⁵ 47 U.S.C. § 151 (2000).

²⁵⁶ *Comcast P2P Order*, *supra* note 4, ¶ 16. In support of the first goal, the Commission reasoned that Comcast’s practice of inhibiting consumer access to certain content had the effect of making the service slower even when doing so would not necessarily ease network congestion, and that such practices could also make “Internet communications as a whole, less efficient.” *Id.* In support of the second goal, the Commission reasoned that by intervening to stop Comcast’s practice of inhibiting the ability of consumers with cable modem service to access high-definition video over the Internet, the resulting competition to cable “should result in downward pressure on cable television prices, which have increased rapidly in recent years.” *Id.* Setting the obvious frailty of these arguments aside for the moment, rates for the many cable service tiers have been de-regulated since 1999. *See* 47 U.S.C. § 543(c)(4). The only rates still subject to regulation at the local franchising authority level—those for basic cable service—have been de-regulated in many communities by virtue of the presence of “effective competition” by other multichannel video programming distributors. *See* 47 U.S.C. §§ 533(a)(3), 543(b)(1), 543(d), 543(l)(1). Thus, the FCC cannot justify the exercise of jurisdiction over the network management practices of all broadband ISPs as “reasonably ancillary” to its responsibilities over cable rate levels.

²⁵⁷ 47 U.S.C. § 151 (2000); *Comcast P2P Order* ¶¶ 15-16; NPRM ¶ 51 (“For one, the Commission seeks to promote investment and innovation with respect to the Internet, as with other communications technologies”), *citing* 47 U.S.C. §§ 151, 157, 257, 1302(a); Recovery Act § 6001(k)(1); 47 U.S.C. § 152. *See also* NPRM ¶ 185; Appendix A; Appendix C ¶ 6.

²⁵⁸ FCC Brief in Support at 46-50.

²⁵⁹ FCC Brief in Support at 46 (citing *Southwestern Cable*, 392 U.S. at 167).

i. The Supreme Court Has Never Upheld an Exercise of Ancillary Jurisdiction Solely on the Basis of Section 1

The *Comcast P2P Order* asserts that the Supreme Court “has never rejected section 1 as a basis for [its] ancillary jurisdiction.”²⁶⁰ This, however, is an untenably slender reed upon which to support such an exercise because the Court has never been presented with such a case posing the question. In the two instances in which challenged cable regulations grounded in ancillary jurisdiction were upheld, the Supreme Court explicitly held that the actions were ancillary to the Commission’s responsibilities to regulate television broadcasting pursuant to the comprehensive broadcast licensing system established by Congress in Title III.²⁶¹ In the third case, *Midwest Video II*, the Court struck down the Commission’s rules, and established firm limits on the scope of the FCC’s ancillary jurisdiction. The Court explicitly reaffirmed that any exercise of such authority under Title I must not only make “reference to the provisions of the Act directly governing” the activity to which the requirement is alleged to be ancillary, but must also not be contrary to the express provisions of the Act concerning that activity.²⁶² For that reason, the Commission’s access requirements, which effectively imposed common carrier status on cable operators in contravention of statutory prohibition of treating broadcasters as common carriers, were found to be beyond its delegated authority.

ii. Other Precedents Affirm that Ancillary Jurisdiction Is Incidental To and Contingent Upon Expressly Delegated Regulatory Authority in Titles II and III

In the *Comcast P2P Order*, the Commission relied upon two D.C. Circuit cases, *CCLIA* and *Rural Telephone*, and two cases from other circuits, together with one of its own prior orders, in support of its argument that section 1 is a stand-alone source of its ancillary jurisdiction to prescribe network neutrality rules.²⁶³ The Commission maintains that *CCLIA*

²⁶⁰ See *Comcast P2P Order*, *supra* note 4, ¶ 16 n.76. (citing *Midwest Video II*, 440 U.S. 689).

²⁶¹ See *Southwestern Cable*, 392 U.S. 157, 178 (1968); *Midwest Video I* 406 U.S. at 663.

²⁶² See *Midwest Video II*, 440 U.S. at 706; see *supra* Part III.A.1.c.

²⁶³ *Comcast P2P Order*, *supra* note 4, ¶ 19 (citing *CCLIA*, 693 F.2d at 212–13); *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730–31 (2d Cir. 1973) and *Gen. Tel. Co. of the Sw. v. United States (General Telephone)*, 449 F.2d 846, 854–55 (5th Cir. 1971); ¶ 16 n.76 (citing *In re IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10262–63, ¶ 29 (May 19, 2005) (*VoIP E911 Order*)). Needless to say—as interesting as they are—the Commission cannot rely on its own views of its ancillary jurisdiction as authoritative precedent unless and until they have been accepted by a reviewing court.

stands for the proposition that it may exercise ancillary jurisdiction in furtherance of its section 1 “responsibilities is to assure a Nationwide system of wire communications services at reasonable prices.”²⁶⁴ From this, the Commission concluded that the D.C. Circuit “and others have consequently upheld actions premised on our section 1 ancillary authority” insofar as it furthers statutory purposes set forth therein.²⁶⁵

The D.C. Circuit’s *CCIA* decision does not, however, support the proposition that the Commission may exercise its ancillary jurisdiction solely pursuant to section 1 of the Act. Nor do the other cases cited by the Commission permit it to exercise jurisdiction ancillary to the provisions of Title I, and none of these cases demonstrate judicial acceptance of this sweepingly broad interpretation of the doctrine of *virtually unlimited* ancillary jurisdiction. The courts have upheld FCC actions premised on the agency’s section 1 ancillary authority, but only insofar as that authority was *also* demonstrably “reasonably ancillary”—that is, contingent upon or incidental to—one of the Commission’s expressly delegated regulatory powers located elsewhere in the Act.

CCIA involved review of the FCC’s Second Computer Inquiry (*Computer II*), in which the Commission found that enhanced data processing services and customer premises equipment (“CPE”) were not within the scope of its Title II jurisdiction, but were within its ancillary jurisdiction under sections 152 and 153 of the Communications Act.²⁶⁶ The *Computer II* framework replaced earlier rules that required the FCC to make case-by-case determinations whether to treat “hybrid” message communications/computer processing services as regulated common carrier offerings. Under the *Computer II* framework, “basic services” that performed pure transmission functions such as message or circuit switching “that is virtually transparent in terms of its interaction with customer supplied information,” would be subject to common carrier regulation under Title II.²⁶⁷ “Enhanced service” which “combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the

²⁶⁴ *Comcast P2P Order*, *supra* note 4, ¶ 16 n.76 (citing *CCIA*, 693 F.2d at 213) (emphasis added).

²⁶⁵ *Id.*; see also FCC Brief in Support at 46-48 (Section 1 contains “responsibilities” the FCC is required to pursue, including the responsibility “to assure a nationwide system of wire communications services at reasonable prices,” sufficient to sustain an exercise of ancillary jurisdiction).

²⁶⁶ *CCIA*, 693 F.2d at 205, 207 (“Section 152 gives the Commission jurisdiction over ‘all interstate and foreign communication by wire or radio,’ and section 153 defines ‘communication by wire’ as ‘the transmission of writing, signs, signals pictures and sounds of all kinds ... incidental to such transmission.’”).

²⁶⁷ *Id.* at 203, 204 n.18.

subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information," would not be subjected to common carrier regulation, but rather to be left to marketplace competition.²⁶⁸

The FCC imposed a structural separation requirement on common carriers, pursuant to its ancillary jurisdiction, under which they could offer enhanced services to consumers only through separate subsidiaries, and ruled that consumer premises equipment would no longer be regulated as a Title I common carrier offering, but would be provided on an unregulated basis. Included among the *Computer II* rules was preemption of state regulation of CPE, which the Commission has just deregulated. CPE was previously treated as a Title II service, physically connected to the Title II telephone network, and the Commission's preemption was designed to prevent "any misallocation of costs between an entity's higher rates for its monopoly services."²⁶⁹

The parties in *CCIA* challenged the Commission's action on the grounds that the FCC overreached its ancillary jurisdiction. The *CCIA* court first observed that when the FCC decided to move away from its previous framework governing enhanced services, it was "compelled to choose a new regulatory approach to fulfill its statutory duty 'to make available ... to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service.'"²⁷⁰

The *CCIA* court's analysis proceeded from the view that "the Commission's decision in *Computer II* [is] a demarcation of the scope of Title II jurisdiction in a volatile and highly specialized field and a concomitant substitution of alternative regulatory tools for traditional Title II regulation in this field."²⁷¹ The court found the FCC's justifications for not subjecting enhanced services or CPE to Title II regulation sustainable on either grounds asserted by the Commission. That is, that they are not common carrier communications activities, and even if some could be so classified, "the Commission is not required to subject them to Title II regulation where, as here, it finds that it cannot feasibly separate regulable from nonregulable services."²⁷² The *CCIA* court observed that, as an alternative to Title II regulation, the

²⁶⁸ *Id.* at 204 n. 18

²⁶⁹ *Id.* at 213.

²⁷⁰ *Id.* at 207 (quoting section 1, 47 U.S.C. § 151).

²⁷¹ *Id.*

²⁷² *Id.* at 210.

Commission used its ancillary jurisdiction to impose a structural regulation scheme only through a separate subsidiary, which was an appropriate use of its resources under circumstances where the difficulty of isolating activities subject to Title II outweighs the benefits to be gained by that regulation.²⁷³ Therefore, the court was “faced only with the issue whether the Commission’s *discretion extends to deciding what regulatory tools to use in regulating common carrier service.*”²⁷⁴

The *CCIA* court appears to have viewed CPE and enhanced services as adjuncts to (if not members of the class of) regulated common carrier services subject to express Commission regulatory jurisdiction under Title II. The example of an enhanced service cited by the court was AT&T’s “Dial It” service, “whereby subscribers dial a certain number to gain access to stored information such as the scores of professional sports contests.”²⁷⁵ Such common carrier enhanced services subject to the *Computer II* structural separation requirements were obviously closely intertwined with, or extensions of, the Commission’s regulation of transmission service.²⁷⁶

Thus, the CPE unbundling and structural separation requirements for enhanced services were upheld as necessary to accomplish the Commission’s responsibilities for regulating common carrier services pursuant to Title II. That is, when the *CCIA* court stated that “[regulation of] both enhanced services and CPE was necessary to assure wire communications at reasonable rates,”²⁷⁷ the court’s reference must have been to the FCC’s specific statutory mandate to ensure reasonable rates for basic transmission services pursuant to sections 201

²⁷³ *Id.* at 211. The rule imposed pursuant to ancillary jurisdiction is referred to in the quoted passage as an “alternative” to Title II regulation, yet it is evident from the *CCIA* decision as whole that the structural separation rules were imposed ancillary to the FCC’s Title II regulatory responsibilities for the provision of basic transmission services by communications common carriers. Admittedly, the *CCIA* decision is not a model of clarity on this point, *id.* at 207, but this view is consistent with the views of other courts, discussed in Part III.C.1.c, *infra*, as well as the subsequent *MPAA* and American Library Association cases, discussed above.

²⁷⁴ *Id.* at 212 (emphasis added). In the passage quoted, the *CCIA* court acknowledges that the relevant jurisdictional question is the FCC’s ability to choose among the regulatory tools at its disposal “in regulating common carrier services.” *Id.* In other words, the action was ancillary to its responsibilities for Title II common carrier services.

²⁷⁵ *Id.* at 204 n.18.

²⁷⁶ Joint Amicus Brief at 14 (citing *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-31 (2d Cir. 1973) (upholding predecessor FCC *Computer I* decision ordering common carriers to provide enhanced services through a separate subsidiary)).

²⁷⁷ *CCIA*, 693 F.2d at 213.

through 203, rather than the more general purposes stated in section 1 of the Act.²⁷⁸ Despite the *CCIA* court's *explanation* of the doctrine of ancillary jurisdiction, it is evident that the Commission actions were upheld because they were found to be reasonably ancillary to its responsibilities to implement specific common carrier mandates contained in Title II.

Rural Telephone too fails to support the Commission's ability to impose regulations solely pursuant to section 1 of the Act.²⁷⁹ The case involved the FCC's creation of interstate access charges following the dissolution of the Bell System, and included a mechanism for explicit funding of support for universal telephone service.²⁸⁰ The access charges were created pursuant to the Commission's authority to regulate the rates, terms, and conditions of common carrier services pursuant to sections 201, 202, and 203 of the Act.²⁸¹ This is evident from the underlying Commission order establishing high cost apportionment of universal service reviewed by the D.C. Circuit.²⁸²

The *Rural Telephone* court stated that the universal service funding mechanism was within the FCC's statutory authority under sections 1 and 4(i) "in order to further the objective of making communication service available to all Americans at reasonable charges."²⁸³ However, finding the action within the FCC's ancillary jurisdiction was probably unnecessary to the holding, as funding for universal service had long been an element of Title II ratemaking.²⁸⁴ It is noteworthy that the *Rural Telephone* court further observed that "[h]ad the Commission proposed the Universal Service Fund for the purpose of subsidizing the incomes of impoverished

²⁷⁸ It is section 201(b), rather than section 1, which declares unjust or unreasonable rates for common carrier communication services to be unlawful. 47 U.S.C. § 201(b) (2000).

²⁷⁹ *Comcast P2P Order*, *supra* note 4, ¶ 16 fn. 76 (citing *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988); FCC Brief in Support at 46).

²⁸⁰ *Rural Tel.*, 838 F.2d at 1314–15.

²⁸¹ *See In re MTS & WATS Market Structure*, Third Report and Report, 93 FCC 2d 241, ¶¶ 37–38, 41, 45–46 (Dec. 22, 1982), *aff'd* in principal part sub nom. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

²⁸² As the Commission held: "The basic provisions for the protection of universal service recommended by the Joint Board represent a sound balancing of concern for the promotion of universally available telephone service at reasonable rates and the need to prevent uneconomic bypass of the local exchange. ... We also agree with the Joint Board's plan to direct assistance to high cost areas. This approach will promote universal service by enabling telephone companies and state regulators to establish local exchange service rates in high cost areas that do not greatly exceed nationwide average levels." *In re Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 96 FCC 2d 781, ¶¶ 29–30 (Dec. 1, 1983).

²⁸³ *Rural Tel.*, 838 F.2d at 1315; *see* 47 U.S.C. §§ 151, 154(i) (2000).

²⁸⁴ Joint Amicus Brief at 14.

telephone users, it would have exceeded its authority under section 154(i), as the provision of public welfare is not among its functions.”²⁸⁵ The most sensible reading of this decision is that the FCC’s extensive Title II responsibilities for the regulation of common carrier services and rates provided the hook upon which the Commission’s jurisdiction to create the universal service support mechanism rested.

In other cases not cited by the Commission, the D.C. Circuit has explicitly stated that ancillary jurisdiction must find a source outside Title I to which the challenged regulations may be said to be reasonably ancillary. In *NARUC II*—a 1976 case involving a challenge to an FCC rule preempting state common carrier regulation over the use of cable system leased access channels for two-way point-to-point non-video communications—the D.C. Circuit explained that “each and every assertion of jurisdiction” to regulate in a particular manner “must be independently justified as reasonably ancillary to” a specific statutorily mandated responsibility.²⁸⁶ The court found that “pre-emption of regulatory power of two-way, non-video cable communications is not within the ‘ancillary to broadcasting’ standard as developed in *Midwest [Video I]*, even absent the apparent applicability of the [section] 152(b) jurisdictional bar.”²⁸⁷

The *NARUC II* court reasoned that the three Supreme Court cases addressing the scope of the FCC’s ancillary authority over cable communications failed to support the Commission’s claim that it had *blanket jurisdiction over all* aspects of cable.²⁸⁸ To the contrary, the court found that the Supreme Court’s plurality decision in *Midwest Video I* “devoted substantial attention to establishing the requisite ‘ancillarity’ between the Commission’s authority over broadcasting and the particular regulation before the Court,” and that the Chief Justice’s concurring opinion suggested that “some attempted regulations of cable operations would fall outside the delegated power.”²⁸⁹ Additionally, the court held that “the [Supreme] Court’s reasoning in both *Southwestern* and *Midwest [Video I]* compels the conclusion that the cable jurisdiction, which

²⁸⁵ *Rural Tel.*, 838 F.2d at 1315.

²⁸⁶ *NARUC II*, 533 F.2d at 612. In this case, the mandated responsibility was over broadcasting.

²⁸⁷ *Id.* at 617.

²⁸⁸ *Id.* at 612-615.

²⁸⁹ *Id.* at 613.

they have located primarily in § 152(a), is really incidental to, and contingent upon, specifically delegated powers under the Act.”²⁹⁰

The *NARUC II* court rejected the Commission’s argument that blanket jurisdiction over cable was “essential, if the ‘goal of a nationwide broadband communications grid’ is to be achieved.”²⁹¹ The court was “not convinced that this goal of [a] nationwide communications network must, in all cases, take precedence, especially where the Commission jurisdiction is explicitly denied under other provisions of the Act.”²⁹²

This long term goal which the Commission sets out for itself apparently has its roots in the general purpose section of the Act, 47 U.S.C. § 151 (1970). While that section does set forth worthy aims toward which the Commission should strive, it has not heretofore been read as a general grant of power to take any action necessary and proper to those ends. Especially in view of our conclusion that [section] 152(b) seems to bar Commission jurisdiction in this case, we are extremely dubious about the legal substance of this argument by the Commission, even if the facts were available to support it.²⁹³

These cases, together with the more recent D.C. Circuit decisions in *MPAA* and *American Library Association* are consistent with this limited view of the FCC’s ancillary authority.²⁹⁴ They therefore fail to support the FCC’s view that it may support an exercise of ancillary jurisdiction solely in reference to the statements of purpose contained in section 1.

Other circuit courts also share the D.C. Circuit’s view that the Commission’s ancillary jurisdiction must be exercise incidental to, and contingent upon, its authority under Titles II or III, despite the Commission’s arguments to the contrary.²⁹⁵ The Commission relies on *GTE*

²⁹⁰ *Id.* at 612.

²⁹¹ *Id.* at 613.

²⁹² *Id.*

²⁹³ *Id.* at 614 n.77 (citation omitted).

²⁹⁴ Yet another D.C. Circuit decision, *Southwestern Bell*, also undermines the Commission’s expansive view of its section 1 authority. *See Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). *Southwestern Bell* involved the FCC’s attempt to regulate the provision of dark fiber by requiring phone companies to provide dark fiber under tariff. Although the case did not involve an ancillary jurisdiction challenge, its language is instructive on the D.C. Circuit’s understanding of the doctrine: “The Act gives the Commission specific regulatory responsibilities regarding common carriers under [T]itle II of the Act, and broadcasting under [T]itle III. In addition, the Commission has general regulatory jurisdiction over ‘all interstate and foreign communications by wire or radio’ The Commission’s general jurisdiction over interstate communication and persons engaged in such communication, however, ‘is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities’ under [T]itles II and III of the Act.” *Id.* at 1479 (citations omitted).

²⁹⁵ The question whether the Commission may exercise jurisdiction ancillary to its Title VI responsibilities for cable communications has yet to be presented to the courts, but there is no doctrinal reason why Title VI responsibilities could not serve as the basis for an exercise of ancillary jurisdiction in the proper case.

Service Corp. v. FCC as “upholding the Commission’s section 1 authority.”²⁹⁶ *GTE*, however, was cited by the Ninth Circuit in *California v. FCC* for precisely the opposite conclusion: “upholding the FCC’s regulation of enhanced services as ancillary to Commission’s authority over interstate basic telephone services.”²⁹⁷ The Second Circuit’s references in *GTE* to the Commission’s “broad and comprehensive rule-making authority in the new and dynamic field of electronic communication” are clearly not the sole basis for the decision.²⁹⁸ Rather, the *GTE* decision upheld the Commission’s rules governing the provision of non-regulated computer data processing services by communications common carriers as being within the scope of the FCC’s authority over common carriers, rather than resting on Title I as a “stand-alone” source of authority.²⁹⁹

Nor does *General Telephone Company of the Southwest v. United States*, a Fifth Circuit decision involving review of a Commission rule prohibiting telephone companies from providing cable services through affiliates unless they allowed cable operators to attach to phone company utility poles, support the Commission’s position.³⁰⁰ There the court declined to decide the full scope of the Commission’s ancillary jurisdiction in the area of cable regulation under section 2(a) of the Act, “since [it was] of the opinion that that section together with [s]ection 1 and [s]ection 214 provide ample jurisdiction for the Commission’s orders.”³⁰¹ While the *General*

²⁹⁶ *Comcast P2P Order*, supra note 4 ¶ 16 n. 76; *GTE Serv. Corp. v. FCC (GTE)*, 474 F.2d 724, 730–31 (1973); FCC Brief in Support at 47 (“So too, the Second Circuit, reviewing a precursor to Computer II, upheld on the authority of Title I a structural separation requirement for telephone companies’ provision of data processing services on the ground that ‘even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area ... intimately related to the communications industry ... where such activities may substantially affect the efficient provision of reasonably priced communication service.’”)

²⁹⁷ *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990).

²⁹⁸ *GTE*, 474 F.2d at 729–32 (upholding the Commission’s “maximum separation” rules governing the entry of communications common carriers into the non-regulated field of data processing services as supported by the Commission’s concern that its “carriers provide efficient and economic [telephone] service to the public”).

²⁹⁹ *Id.* Additionally, the court’s language cited in the FCC’s Brief in Support is consistent with the view that the FCC may exercise ancillary jurisdiction over adjuncts to regulated services where such service is “intimately related to the communications industry” and the activities to be regulated “may substantially affect the efficient provision of reasonably priced service.” FCC Brief in Support at 47.

³⁰⁰ See *Comcast P2P Order*, supra note 4, ¶ 16 n.76; *General Telephone*, 449 F.2d at 850.

³⁰¹ *General Telephone*, 449 F.2d at 854. Section 214 requires carriers to obtain from the Commission a certificate of “public convenience and necessity” prior to constructing new lines or acquiring or operating any line; the FCC is permitted to “attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.” 47 U.S.C. § 214(a); see *General Telephone*, 449 F.2d at 854. The court noted that this specific authorization is “supplemented by Section 4(i) of the Act (47 U.S.C. § 154(i))

Telephone court recognized that the FCC had “additional and overriding responsibilities” pursuant to section 1, the holding was based upon the Commission’s decision “in this instance to implement the national policy by limiting the involvement of common carriers, over which the Commission has unquestioned jurisdiction, in [cable] operations.”³⁰² The Fifth Circuit thus recognized that section 1’s broad purposes may be effectuated through the FCC’s ancillary jurisdiction only when the exercise is contingent upon and incidental to its much more narrowly-tailored regulatory authority under Titles II and III of the Act.

The Ninth Circuit, in *California v. FCC*, squarely rejected the FCC’s attempt to justify rules preempting intrastate structural separation requirements on its Title I authority alone.³⁰³ After noting that the “FCC attaches great significance to its decision to regulate enhanced services pursuant to Title I, rather than Title II,” the court rejected the Commission’s argument that it was not bound by the restriction of its jurisdiction contained in section 2(b)(1) because that pertained only to cases in which the Commission had chosen to exercise its Title II authority to regulate common carriers.³⁰⁴ The Ninth Circuit found that the Commission’s argument misconceived the nature of its ancillary authority:

Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission’s specific statutory responsibilities. ... In the case of enhanced services, the specific responsibility to which the Commission’s Title I authority is ancillary [is] to its Title II authority over common carrier services.³⁰⁵

iii. Summary

In conclusion, in virtually every instance in which the courts have upheld the FCC’s reliance upon its Title I ancillary jurisdiction, the agency’s action was also supported by its express statutory responsibilities to regulate the closely related activities of television broadcast stations and other radio licensees under Title III or the provision of telecommunications services

which permits the agency to ‘make such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.’” *Id.*; see 47 U.S.C. §§ 151, 154(i), 214 (2000).

³⁰² *General Telephone*, 449 F.2d at 854–55 (emphasis added).

³⁰³ *California v. FCC*, 905 F.2d at 1240 & n35.

³⁰⁴ *Id.* at 1240 n.35 (citation omitted).

³⁰⁵ *Id.* (citations omitted).

by common carriers under Title II.³⁰⁶ The case law consistently demonstrates that title I ancillary jurisdiction is a derivative, not generative, source of authority; it is incidental to and contingent upon explicitly delegated regulatory authority found elsewhere in the Act.

The Commission's position boils down to little more than an assertion that it may exercise its ancillary jurisdiction in any case where the action may be said to further the general goals stated in section 1. This is an unsupportable view of the Commission's ancillary jurisdiction, as it "mocks the principle that the statute constrains the agency in any meaningful way."³⁰⁷ If accepted, it would obviate the need for any other provision of the Act.

In other words, if the FCC's view that section 1, standing alone, supports the exercise of ancillary jurisdiction over Comcast's broadband network management practices, then the rest of the Act is rendered no more than surplus usage. The Commission's core position that Title I may satisfy both prongs of the test for ancillary jurisdiction is thus untenable because Title I is considered the source of ancillary jurisdiction; the position, thus, is akin to saying that the FCC can regulate if its actions are ancillary to its ancillary jurisdiction, and that is one ancillary too many.³⁰⁸ Unfortunately for the Commission, the courts have already rejected this sweeping view of its powers and have instead consistently held that "Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's other specifically articulated statutory responsibilities."³⁰⁹

³⁰⁶ In addition to the cases discussed above, *see* *Mobile Commc'ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1996) (approving exercise of ancillary authority pursuant to the FCC's statutory responsibility under section 309(a) to grant licenses in the public interest); *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107-09 (D.C. Cir. 1987) (approving ancillary authority to impose prospective rate reductions "absolutely necessary" given the mandates of sections 204 and 205 of the Act);

³⁰⁷ *See* *Brand X*, 545 U.S. at 1014 (Scalia, J., dissenting).

³⁰⁸ As the D.C. Circuit put it, an exercise of ancillary jurisdiction cannot rest solely on Title I because it would "thus appear ancillary to nothing." *American Library Association*, 406 F.3d at 702.

³⁰⁹ *California v. FCC*, 905 F.2d at 1240 n.35 (rejecting the FCC's attempt to preempt state regulation of structural separation requirements and inconsistent nonstructural safeguards on the grounds that they would negate its Computer III policy of permitting the integration of basic and enhanced services offered on an interstate basis; the FCC cannot rely on its claimed justification that section 2(b)(1), limiting its authority over intrastate common carrier services, was inapplicable because it has chosen to regulate enhanced services pursuant to Title I rather than Title II because "[i]n the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services."); *see* *Southwestern Cable*, 392 U.S. at 178 (finding the FCC's Title I authority "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities"); *MPAA*, 309 F.3d at 805 (finding that the "FCC must look beyond § 1 to find authority for regulations that significantly implicate program content"); *American Library Association*, 406 F.3d at 692 (vacating broadcast flag rules imposed solely under

2. Sections 201(b) and 257 Provide No Basis for Network Neutrality Rules

In addition to its misplaced reliance on provisions of the Act articulating only broad policies, the NPRM also cites sections 201(b) and 257 as authorities for its ancillary jurisdiction to impose network neutrality mandates.³¹⁰ According to the NPRM, section 201(b) “gives the Commission specific authority ‘to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act.’”³¹¹ Section 257, which directs the Commission, *inter alia*, to identify and eliminate market entry barriers for entrepreneurs, is discussed in the NPRM only in terms of the Commission’s “goals” for its rulemaking; it is also cited as legal basis for the proposed rules.³¹² Neither provision, however, can serve as a basis for the proposed network neutrality rules.

The Commission may not rely on the grant of general rulemaking authority in section 201(b) to support its ancillary jurisdiction.³¹³ To accept such a proposition would unacceptably conflate means and ends. The rulemaking authority granted in section 201(b) is the “means” by which the FCC is carry out its regulatory responsibilities – the “ends” – which are contained in the operative provisions of the Act. As former Chairman Powell observed, “Were an agency afforded *carte blanche* under such [broad] provision[s], irrespective of subsequent congressional acts that did not squarely prohibit such action, it would be able to greatly expand its regulatory reach.”³¹⁴ Instead, just as with its section 4(i) and 303(r) authority, the Commission must first demonstrate that its proposed rules fall within the scope of its delegated regulatory authority, before it may rely upon section 201(b) for its rulemaking abilities.³¹⁵

More importantly, the Commission may not regulate in areas not delegated to it by Congress simply by citing the “public interest” language contained in section 201(b). Section

FCC’s Title I authority because, lacking a “statutory foundation,” they were therefore “ancillary to nothing”); *see also* Illinois Citizens Comm. for Broad. v. FCC, 467 F.2d 1397, discussed *supra* at note 132.

³¹⁰ NPRM ¶¶ 51-55, 185, Appendix A, & Appendix C ¶ 6.; *Comcast P2P Order*, *supra* note 4, ¶¶ 17, 19–20; 47 U.S.C. §§ 201, 257 (2000).

³¹¹ NPRM ¶ 84.

³¹² NPRM ¶ 51 n.114, ¶ 185, Appendix A, & Appendix C ¶ 6.

³¹³ The Commission appears to have abandoned its reliance on the substantive mandates of section 201(b), which prohibit unjust and unreasonable common carrier rates, as a basis for its ancillary authority to enforce network neutrality principles, as embodied in the *Comcast P2P Order*. *See Undue Process*, *supra* note 45 at 24-27 for a discussion of why the commands of 201(b) cannot support the Commission’s action in that case.

³¹⁴ *MPAA*, 309 F.3d at 806.

³¹⁵ *Id.* at 805-06.

201(b) does not, as the NPRM suggest, create a “general public interest mandate” for the Commission to implement as it sees fit. That is tantamount to an assertion that henceforth, the federal communications law will be whatever the FCC says it will be—neither more nor less.³¹⁶ The idea that Congress has delegated such open-ended and unlimited authority to the FCC by virtue of its section 201(b) rulemaking authority is unsupported by the ancillary jurisdiction case law and wholly unsupportable as a matter of administrative law.

Nor can section 257 provide a basis for the Commission to adopt network neutrality rules. Section 257, entitled “Market entry barriers proceeding,” directs the Commission, within fifteen months after enactment of the 1996 Act, to:

complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.³¹⁷

Further, every three years following the completion of the aforementioned proceeding, the Commission is “to review and report to Congress” on “any regulations prescribed to eliminate barriers within its jurisdiction” and any “statutory barriers identified under subsection (a) ... that the Commission recommends be eliminated consistent with the public interest.”³¹⁸ Congress expressly directed the Commission, “[i]n carrying out subsection (a) ... [to] seek to promote the policies and purposes of [the Act] favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”³¹⁹

Thus, the provision created new obligations for the Commission consisting of a single rulemaking proceeding and a continuing reporting obligation, without expanding the scope of its regulatory authority over providers of either telecommunications or information services. By its own terms, section 257(a) directs that the Commission carry out the statutory purpose of

³¹⁶ Lewis Carroll, *Through the Looking Glass, and What Alice Found There* (1871) (“‘When I use a word,’ Humpty Dumpty said in a rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”).

³¹⁷ 47 U.S.C. § 257(a) (2000).

³¹⁸ 47 U.S.C. § 257(c).

³¹⁹ 47 U.S.C. § 257(b).

“identifying and eliminating” market entry barriers, “by regulations pursuant to its authority under this Act (other than this section),” strongly suggesting that the provision itself did not add to such regulatory authority. It is therefore highly doubtful that section 257, standing alone, may be relied on to support an exercise of ancillary jurisdiction not necessary for the accomplishment of an express statutory mandate contained elsewhere in the Act. Consistent with the principle established by the D.C. Circuit in *American Library Association*,³²⁰ once the FCC has discharged its rulemaking and reporting obligations under section 257, its delegated authority over the matter ends.³²¹

3. Network Neutrality Rules Are Not Reasonably Ancillary to Titles II, III, and VI of the Act

Additional broadly-based arguments in support of the Commission’s ancillary jurisdiction to regulate Internet services pursuant to entire Titles of the Act are contained in the FCC’s Brief in Support:

Services provided over the Internet affect nearly all aspects of federally regulated communications. Directly at issue, for example, peer-to-peer applications make possible video distribution and voice services that pose a competitive threat to the services offered by broadcasters, cable television operators, and telephone companies. Comcast Order ¶ 17. The Commission accordingly has ancillary authority to regulate cable modem service by virtue of its regulatory authority over telephony (Title II of the Act), broadcast radio and television (Title III), and cable services (Title VI).³²²

In other words, regulation of broadband Internet access services is *generally* ancillary to all Title II regulation of voice telephone services, Title III regulation of broadcast radio and television services, and Title VI regulation of cable services because of the potential competition to such services made possible by distribution of Internet voice and video offerings via peer-to-peer applications. This argument suggests that the Commission may impose, for example, a non-discrimination rule on broadband ISPs, effectively relegating them to common carrier status, as reasonably ancillary to its Title III responsibilities for broadcast television and radio services,

³²⁰ See discussion *supra* in Part III.B.2.b.

³²¹ See *MPAA*, 309 F.3d at 807 (providing that in the case of section 713(f) where Congress solely authorized the Commission to produce a report, its delegated authority on the matter was limited to producing the report). See also *Undue Process*, *supra* note 45 at 84-86 for a more complete critique of the *Comcast P2P Order*’s reliance on section 257 to supply the basis for its ancillary jurisdiction over Comcast’s network management practices.

³²² FCC Brief in Support at 43.

despite Title III's prohibition on treating broadcasters as common carriers and the Supreme Court's decision in *Midwest Video II* striking down such attempted regulation as applied to cable operators.³²³

In support of this extraordinary claim, the FCC argues that the situation with a broadband ISP such as Comcast is directly analogous to that presented in *Southwestern Cable*, where “video distribution over the Internet has the potential to affect the broadcast industry in much the same way that cable television did.” Drawing the analogy further, the Brief states:

Video programming distributed over the Internet is akin to out-of-market programming carried by cable. Both potentially affect the economics of the television marketplace and affect local origination of programming, diversity of viewpoints, and the desirability of providing service in certain markets. ... It would significantly interfere with the Commission's ability to effectuate its policies concerning such matters if the agency were powerless to prevent cable modem service providers from denying Internet users the benefits of additional avenues of video distribution. FCC authority over Internet access is reasonably related to the agency's responsibilities under Title III of the Communications Act.³²⁴

Continuing this chain of logic, the Brief posits that authority over cable modem services is likewise ancillary to the Commission's oversight of cable television services under Title VI of the Act, particularly its concern “about unreasonable cable rates,” because Internet video distribution could eventually serve as a check on future cable rates. “Because Congress has given the FCC authority over certain cable service rates, 47 U.S.C. § 543, and cable providers have the incentive to squelch competing distribution media and thereby reduce price pressure on their services, enforcement of federal Internet policy is directly related to section 543 ...”³²⁵

Finally, the Brief states that the ability of a broadband ISP to block access to Internet applications could impair the Commission's implementation of Title II. Using VoIP as an example, the Brief asserts that ancillary jurisdiction over the provision of a broadband Internet access service is permissible because VoIP (i) can affect prices and practices addressed by section 201(b) and 205; (ii) as well as network interconnections and the ability of telephone subscribers to reach one another ubiquitously that is addressed in section 256; and (iii) “can

³²³ See 47 U.S.C. § 3(h); *Midwest Video II*, 440 U.S. at 702-707.

³²⁴ FCC Brief in Support at 43-44 (citation omitted).

³²⁵ *Id.* at 44. This is a very creative argument, which was not made in the *Comcast P2P Order* itself.

affect the ‘national policy’ of ‘vigorous economic competition [and] technological advancement’ and the removal of barriers to market entry that are the subject of” section 257.³²⁶ The Brief argues that “as with competition in video markets, the viability of competition in voice communications cannot be left to the unregulated power of cable modem providers, which in many cases offer telephone service,” that the FCC need not wait for actual harms such as those speculated about to occur, and that the Supreme Court in *Southwestern Cable* has upheld the exercise of ancillary jurisdiction “to ‘plan in advance of foreseeable events, instead of waiting to react to them.’”³²⁷

It is difficult to know where to begin in responding to such arguments. But one thing is certain, if one were to accept the FCC’s jurisdictional theory, that it may exercise ancillary jurisdiction over the provision of information and Internet services loosely based on all the substantive Titles of the Act, there is virtually no limit to what the Commission can do under its ancillary powers. For the reasons advanced above in Part III.B and III.C.1.c, this wholesale theory of ancillary jurisdiction is flatly at odds with the controlling Supreme Court precedents, as well as authoritative precedents from the circuit courts.

The FCC has expounded a theory of its own powers that would permit it to take virtually any action to promote, preserve, and protect “the open, safe, and secure Internet” and “the legitimate business needs of broadband Internet access service providers and broader public interests such as innovation, investment, research and development, competition, consumer protection, speech, and democratic engagement,” without an express delegation of authority from Congress on the barest of connections to nearly every and any substantive provision of Titles II, III, and VI.³²⁸

The fact that there is no conceivable limit on the FCC’s authority under this rationale demonstrates precisely why it is so untenable. This breadth of regulatory delegation is not only impossible to find in the text of the Act, but is contrary to the usually understood and best interpretations of ancillary powers: they cannot be greater than the Commission’s expressly

³²⁶ *Id.* at 44-45. The reasons why section 256 cannot provide a basis for the exercise of ancillary jurisdiction to enforce network neutrality obligations are discussed in *Undue Process*, *supra* note 45 at 82-84.

³²⁷ FCC Brief in Support at 45 (citing *Southwestern Cable*, 392 U.S. at 176-77).

³²⁸ NPRM ¶ 50.

delegated regulatory power.³²⁹ What the Commission is here saying, in effect, is that despite the carefully crafted limitations Congress imposed on its regulatory authority under Titles II, III, and VI, the agency can always use its ancillary powers as a kind of regulatory can opener, to open up the bounds of the statutory provisions permitting the FCC to act, instead, under an unconstrained “public interest mandate.”³³⁰ This theory proves too much.

4. Summary of Statutory Analysis

The Commission claims that its proposed network neutrality rules are reasonably ancillary to sections 230(b), 706(a), 1, 201(b) and 257 of the Act. Yet none of the provisions, whether considered singly or together, provide a basis for the Commission’s proposed Internet service rules.

Sections 230(b) and Section 706(a) cannot provide the source of regulatory authority to which the proposed rules may be considered “reasonably ancillary” because neither directs the FCC *to regulate anything in particular*. Each provides certain regulatory goals or “ends;” neither provides the “means,” that is, an “operative” or “substantive” source of regulatory authority through which Congress intended the FCC to achieve the broad goals of the Act. Sections 230(b) and 706(a) are themselves statements of Congressional policy incapable of supporting FCC regulation of either the Internet or Internet services.

The five separate policy statements contained in Section 230(b) are quite broad and vague and in some cases could be read to contradict one another. Read as a whole, the statements more convincingly repel, rather than support, FCC regulation of the broadband Internet and interactive computer services. Section 230(b)(2) contains perhaps the most directly relevant sub-provision, and it flatly declares that it is the policy of the United States “to *preserve the vibrant competitive free market* that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*.” The remainder of Section 230 creates “Good Samaritan” immunity for Internet service providers and other Internet portals that block objectionable content; it specifies *no role* for the FCC and calls for *no FCC rules* for its implementation. Section 230(b) is more convincingly read to indicate not that Congress wanted the FCC to regulate Internet service providers, but that the FCC observe a policy of non-

³²⁹ Joint Amicus Brief at 20.

³³⁰ NPRM ¶ 83.

regulation or un-regulation of the Internet and Internet services generally. And that is exactly how the FCC has understood section 230(b) since its enactment.

In the case of section 706(a), Congress directed the FCC “to *encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” “Encourage” cannot be reasonably read as a synonym for “regulate.” The sole regulatory responsibility delegated to the FCC in section 706(b) is the obligation to produce a periodic report to Congress on whether advanced telecommunications are being deployed on a reasonable and timely basis. The FCC itself has held that section 706 does not expand its regulatory jurisdiction in any respect; any action the FCC may wish to take upon a negative report must be found elsewhere in the Act.

These policy provisions fail to give the FCC the authority to codify and expand its four Internet policy principles into six “rules of the road” for all broadband Internet access service providers. Even if they could, there is no close nexus or requisite degree of ancillariness between, for example, the proposed nondiscrimination, and the section 706(a) charge that the FCC “encourage the deployment of advanced telecommunications capability.” To the contrary, such regulation is more likely to deter than encourage broadband deployment, leaving the proposed rules fatally inconsistent with statutory purposes.

Similarly, neither do the various policy pronouncements contained within section 230(b)—several of which concern ISPs enabling “blocking and filtering technologies” so that users can restrict access by children to objectionable or inappropriate online material—lend themselves to supporting a nondiscriminatory carriage requirement. There is simply no reasonable relationship between either the specific policy directives or overall purpose of section 230 and the FCC’s proposal to regulate the terms and conditions of the provision of Internet services.

Nor can section 1 serve as a stand-alone source of ancillary authority on the grounds that it imposes “responsibilities” on the FCC that the agency is “required” to pursue.” In no instance has a court upheld the FCC’s exercise of ancillary jurisdiction based solely on the provisions contained in Title I of the Act. The Commission’s view that Title I may satisfy both prongs of the test for ancillary jurisdiction is untenable because Title I is considered the source of ancillary jurisdiction. Rules ancillary to section 1 would be ancillary to nothing.

More broadly, Congress did not delegate to the FCC regulatory authority over the Internet or anything else for that matter solely in the form of “broad policy outlines.” If it had, the Act would be very short, consisting perhaps of no more than a few provisions currently

contained in Title I. The rest, would be no more than surplus usage as the FCC would have a roving commission simply to “go and do good” without any statutory limitations whatsoever. No administrative agency operates under so broad a delegation of authority from Congress, and there is nothing in the Communications Act to suggest that the FCC is the exception.

Nor can sections 201(b) or 257 provide the necessary jurisdictional reference as they concern solely communications services provided by common carriers, bear no reasonable relationship to the network management practices at issue, or otherwise fail to enlarge the scope of the FCC’s existing jurisdiction over providers of broadband information services. The Commission’s attempt to support its proposed network neutrality by the theory that it may exercise ancillary jurisdiction, broadly based, pursuant to entire Titles of the Act – II, III, and VI—simply because services provided over the Internet may affect aspects of federally regulated communications must also fail. The Communications Act neither directs nor permits the FCC to regulate the Internet simply because services provided over it affect nearly all aspects of federally regulated communications. By having to reach so far to demonstrate its jurisdiction, the NPRM exposes nothing more than its absence.

IV. THE DISCRETIONARY AND LIMITLESS POWER ARTICULATED IN THE NPRM IS CONTRARY TO THE ACT

In its attempt to link the proposed network neutrality rules to a purpose of the Act, the Commission has articulated a theory that would allow it unbounded discretion and powers over Internet services. This would result in an unprecedented expansion of the FCC’s powers and is at odds with history. It would be untenable to read the Act to convey so much authority upon the agency.³³¹

A. The NPRM Articulates Unbounded FCC Discretion and Power

The NPRM would prohibit network discrimination, subject only to vaguely defined “reasonable network management” needs; it proposes to flatly prohibit the offering of prioritized access to content, application, and service providers.³³² The Commission’s expansive theory of its statutory authority suggests that the FCC could order rate regulation, and other service

³³¹ Joint Amicus Brief at 21.

³³² NPRM ¶¶ 108, 106.

regulation, in addition to the network disclosure obligations it explicitly proposes, under its section 1 charge to regulate interstate wire and radio communications so as to make available “a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.”³³³ Network management practices of broadband ISPs are to be thusly regulated to further Commission goals that include promoting investment and innovation, promoting competition for Internet access and Internet content, applications and services, and protecting users’ interests, including consumer protection in commercial contexts; the development of technological tools to empower users; speech and democratic participation; and other “national purposes.”³³⁴

The NPRM asserts that the Commission has regulatory authority over Internet network management practices and services to “advance the federal Internet policy” set forth in section 230(b) and to promote other regulatory goals including “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”³³⁵ The NPRM posits that interference with consumer access to desirable content and applications on-line would adversely affect the deployment of advanced telecommunications capabilities.³³⁶

In other words, the FCC has given itself authority to take any step that affects the availability, price, or the quality of Internet service—or that in any other way increases consumer demand for Internet service or certainty of business models for Internet content, applications, and service providers, on the basis of snippets of statutory language strewn across the Act. This theory knows no boundaries—and it is entirely discretionary. The FCC says that it may, but does not say that it must, do any of these things.³³⁷ Congress, however, did not delegate to the FCC such broad regulatory authority over the Internet or any other communications technology or service. If it had, the Act would be very short, consisting perhaps of no more than a few provisions currently contained in Title I, and perhaps sections 201(b) and 303(r).³³⁸ Congress

³³³ NPRM ¶ 51 n.114 (quoting 47 U.S.C. § 151).

³³⁴ See NPRM ¶¶ 5, 50-54.

³³⁵ NPRM ¶¶ 84, 51 n.114 (quoting Section 706(a), 47 U.S.C. § 1302(a)); FCC Brief in Support at 25-27, 40-42.

³³⁶ NPRM ¶ 69.

³³⁷ Joint Amicus Brief at 22.

³³⁸ See Barbara Esbin, The Progress & Freedom Foundation, *The Audacity to Hope Regulatory Restraint Will Prevail* 5-6, Progress Snapshot No. 5.9 (Sep. 2009), <http://www.pff.org/issues-pubs/ps/2009/pdf/ps5.9-regulatory-restraint-hope-audacity.pdf>.

may have created the FCC, as the FCC’s Brief in Support argues, “to maintain regulatory authority in a dynamically changing technological marketplace,” but it was fairly specific about how the FCC was to exercise this regulatory authority.³³⁹ There is simply no statutory support for the view that Congress conferred upon the agency “a free-roaming mandate to cure any and all ills it discovers in the domain of ‘communications by wire and radio.’”³⁴⁰

This is not to suggest that the FCC has *no* ancillary authority over information services. The Supreme Court has approved the general notion of an ancillary jurisdiction. But, this is a far more bounded authority than the Commission suggests in the NPRM. Consistent with the foregoing analysis, the Commission’s ancillary jurisdiction might extend to certain information or Internet-enabled services provided by telecommunications common carriers or cable service providers, but only if they operate as adjuncts to or are auxiliary to a common carrier, broadcast, or cable service, and the regulations demonstrated the necessary “ancillariness” required to support the conclusion that Congress intended the FCC to prescribe such regulations.

The FCC, however, has not said—nor could it—that Internet service is such an adjunct. In fact the Commission’s broadband Internet access service classification orders all reject the position that Internet access service includes any regulated component, when it said that Internet access providers use telecommunications, rather than “offer” telecommunications service to end users.³⁴¹ The NPRM does not even purport to directly connect the proposed network neutrality rules to any specific common carrier, broadcast, or cable service regulatory requirement under the Act, resting its entire ancillary jurisdiction “analysis” instead on statements of statutory purpose, policy, or goals contained in section 230(b) and 706(a), together with a single, unexplained statement that the “growing interrelationship with voice and video services that the Commission has traditionally regulated pursuant to express statutory obligations and its general public interest mandate further supports the Commission’s ... ancillary jurisdiction to establish appropriate rules.”³⁴² In any event, “this ‘everything-affects-everything’ argument is far broader than the connections previously made between ancillary regulation and the regulated services”

³³⁹ FCC Brief in Support at 30.

³⁴⁰ Joint Amicus Brief at 2-3.

³⁴¹ See *Brand X*, 545 U.S. at 979 (quoting *Cable Modem Declaratory Ruling*); see also *Wireline Broadband Order*, *supra* note 6, *Broadband Over Power Line Order*, *supra* note 57, and *Wireless Broadband Declaratory Ruling*, *supra* note 57 ¶¶ 18, 22–26.

³⁴² NPRM ¶ 85.

falling within the Commission’s expressly delegated powers under Titles II or III that the courts have upheld to date.³⁴³

Even in circumstances where ancillary jurisdiction exists, the Commission’s regulatory powers fall far short of its more robust expressly delegated powers over common carriers, broadcasters or cable service providers. The network neutrality regulations proposed are nearly co-extensive with the Commission’s expressly-delegated powers over common carriers. They include non-discrimination obligations, quality of service regulation, and network disclosure requirements; the theoretical justification indicates that rate regulation would be well within the scope of the FCC’s ancillary jurisdiction so conceived over broadband ISPs. This breadth is not only impossible to find in the Act, but is contrary to what all have understood to be the best interpretation of ancillary powers.³⁴⁴

B. The Act Does Not Give the FCC Such Discretionary and Limitless Power

The Supreme Court has already held that the Act does not give the FCC authority to either regulate or not regulate and to decide—on its own—just how much to regulate.³⁴⁵ Prior to Congress’ delegation to the FCC of forbearance authority in the 1996 Act, the FCC had claimed that its statutory authority to “modify” the section 203 tariff filing requirement also allowed it to entirely eliminate the tariffing system.³⁴⁶ The Court rejected the Commission’s argument, holding that the definition of “modify” did not include “eliminate.”³⁴⁷ The decision was also supported by the court’s common-sense inference of Congressional intent: “It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially rate-regulated to agency discretion ...”³⁴⁸ Once Congress enacted legislation to give the FCC the authority to forbear from Title II requirements, it subjected that authority to specific statutory requirements.³⁴⁹ Ancillary jurisdiction, properly understood, is not a matter of agency discretion, but of agency application of its authorizing statute. As the Supreme Court

³⁴³ Joint Amicus Brief at 20.

³⁴⁴ Joint Amicus Brief at 20-31; *see* Part III, *supra*.

³⁴⁵ *Id.* at 23.

³⁴⁶ *MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994).

³⁴⁷ *Id.* at 225-29.

³⁴⁸ *Id.* at 231.

³⁴⁹ *See* 47 U.S.C. § 160(a) (1-3).

stated in *Midwest Video II*, the doctrine of ancillary jurisdiction does not mean that the Commission has “unbounded” jurisdiction as “the Commission was not delegated unrestrained authority.”³⁵⁰

Not only is the amount of FCC discretion claimed contrary to the Act, but so is the extent of the powers that the FCC claims. Communications law precedents draw a line between the Commission’s Title II powers over common carriers—which are extensive and include rate and service regulation—and the Commission’s powers over information services under its ancillary jurisdiction—which, while of somewhat uncertain scope, are less than its powers under Title II.³⁵¹ The NPRM, for example, proposes a nondiscrimination requirement, subject to reasonable network management, which it acknowledges will function in nearly the same manner as the section 201(b) and 202(a) prohibitions on “unreasonable discrimination;”³⁵² and a device attachment requirement nearly identical to the *Carterphone* rules imposed earlier pursuant to the Commissions’ Title II authority over common carriers.³⁵³ Additionally, the NPRM contemplates the imposition of network disclosure rules similar to the “comparably efficient interconnection (CEI) and open network architecture (ONA) rules the Commission adopted in *Computer III*.”³⁵⁴ Although the NPRM contains no broadband Internet access service tariffing or rate regulation rules, the Commission’s jurisdictional theory would easily give it power to regulate rates and service quality. Such “ancillary” power would allow the FCC to essentially re-create in its entirety the economic regulation of Title II under Title I, thus eliminating the previously-settled consequences of the Commission classifying a service as an “information service.”³⁵⁵ This

³⁵⁰ Joint Amicus Brief at 23 (quoting *Midwest Video II*, 440 U.S. at 706).

³⁵¹ *Id.* at 23-29.

³⁵² For example, the NPRM seeks comment on the relationship between the proposed non-discrimination rule and the requirements of Title II, including whether it is preferable to use the section 202 (prohibiting unjust or unreasonable discrimination) or the section 272 (prohibiting discrimination) standard. NPRM ¶¶ 109-15. This strongly suggests that the net effect of the proposed rules is to impose common carrier status on all broadband ISPs.

³⁵³ NPRM ¶¶ 39-40; *Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants), v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants)*, Docket Nos. 16942, 17073, Decision, 13 FCC 2d 420, 424 (1968), *recon. denied*, 14 FCC 2d 571 (1968) (*Carterfone*).

³⁵⁴ NPRM ¶ 127.

³⁵⁵ See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1329-31 (1998) (the hallmarks of regulated industries statutes, including Title II of the Communications Act, are nondiscrimination, just and reasonable rates, and service requirements).

would render Title II largely superfluous, and contravene express provisions that Congress added to the Act in 1996.

As discussed in Part III.A, *supra*, Congress’s actions in the 1996 Act confirm that “information services” regulation necessarily must entail far less Commission authority than common carrier regulation. The 1996 Act codified definitions of information services and telecommunications services without granting the FCC any regulatory powers over information services.³⁵⁶ Moreover, the 1996 Act limited common carrier regulation to “telecommunications services”— *i.e.*, to common carrier (and *not* information) services. The new definition of “telecommunications carrier” stated that a telecommunications carrier “shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”³⁵⁷ This further indicates that the FCC may not simply re-create a common-carrier regime of regulation for “information services.”³⁵⁸

This distinction in the FCC’s regulatory powers over common carriers as opposed to non-common carriers is clear in cases addressing FCC efforts to impose Title II regulation on private carrier services. In *Southwestern Bell*, for example, the FCC attempted to subject local exchange carriers’ private dark-fiber service to Title II.³⁵⁹ The D.C. Circuit reversed, holding that Title II regulation could only be imposed where the entity was, in fact, providing a common carrier service. If an “entity is a private carrier for that particular service ... the Commission is not at liberty to subject the entity to regulation as a common carrier.”³⁶⁰ Although the court acknowledged that the FCC would have “ancillary jurisdiction over private offerings of common carriers,” it clearly held that this is a lesser form of regulatory power, as “only common carrier activity falls within the Commission’s regulatory powers under title II.”³⁶¹

³⁵⁶ 47 U.S.C. § 153(20), (43)-(46).

³⁵⁷ *Id.* § 153(44).

³⁵⁸ *Compare Midwest Video II*, 440 U.S. 689 (FCC may not use ancillary authority in a manner *contrary* to the Act).

³⁵⁹ *Southwestern Bell*, 19 F.3d 1475.

³⁶⁰ *Id.* at 1481.

³⁶¹ *Id.* at 1483.

Southwestern Bell follows a long line of cases denying the FCC the ability to impose Title II regulation based simply on its notions of good policy.³⁶² “While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.”³⁶³ In *NARUC I*, for example, the D.C. Circuit upheld the FCC’s decision to create a private mobile radio service, including a new class of entrepreneurial operators known as “special mobile radio systems,” in the absence of any indication that the systems would in practice behave as common carriers.³⁶⁴ The court, stated, further, that “we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities.”³⁶⁵

³⁶² *NARUC I*, 525 F.2d 630; *MCI*, 512 U.S. at 234 (“the Commission’s estimations[] of desirable policy cannot alter the meaning of the federal Communications Act”).

³⁶³ *Southwestern Bell*, 19 F.3d at 1481.

³⁶⁴ *NARUC I*, 525 F.2d 630.

³⁶⁵ *Id.* at 644. In drawing this conclusion, the *NARUC I* court stated that, “[f]or purposes of the Communications Act, a common carrier is ‘any person engaged as a common carrier for hire ...,’” 47 U.S.C. § 153(h) (1970), whereas the Commission’s regulations offered a “slightly more enlightening definition: ‘any person engaged in rendering communication service for hire to the public,’” 47 C.F.R. § 21.1 (1974). The concept of “the public,” according to the court, “is sufficiently indefinite as to invite recourse to the common law of common carriers to construe the Act.” *Id.* at 640. “A good deal of confusion,” the court observed, “results from the long and complicated history of that concept.” *Id.* After surveying relevant authorities, the *NARUC I* court identified as key “the quasi-public character implicit in the common carrier [which] is that the carrier ‘undertakes to carry for all people indifferently....’” *Id.* at 641. The court explained, “[A] carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.” *Id.* Because private and common carriers may be indistinguishable in terms of the clientele actually served, the dividing line between them must turn on the manner and terms by which they approach and deal with their customers. Thus, in determining whether to overturn the FCC’s classification of Specialized Mobile Radio Systems (SMRS) as non-common carriers, the court examined the likelihood that SMRS would hold themselves out indifferently to serve the public, or such portion of the public as could reasonably make use of the service. “In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the eligible user public.” *Id.* at 642. The court concluded that the answer was no. There was nothing in the proposed FCC regulations that would either compel SMRS to serve any particular applicant, or more importantly, limit “their discretion in determining whom, *and on what terms*, to serve” *Id.* While not a model of clarity, this pre-1996 Act analysis could be read to suggest that the FCC is empowered to impose common carrier status on a non-common carrier, thus supplying the “regulatory compulsion” to serve the public indifferently. Such a reading, however, is contradicted by the court’s rejection of “those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve. ... A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”

The FCC and the courts have similarly understood whatever regulatory power the agency has over information services to be short of common carrier regulation. In the foundational *Computer II* decision, the FCC articulated the legal consequences of its classification scheme: “In defining the difference between basic and enhanced services, we have concluded that basic transmission services are traditional common carrier services and that enhanced services are not. Thus, while those who provide basic services would continue to be regulated, enhanced service vendors would not be subject to rate and service provisions of Title II of the Communications Act.”³⁶⁶ The Commission, of course, stated that it had ancillary jurisdiction over enhanced services, but it acknowledged that “[e]ven though an activity falls within our subject matter jurisdiction, our ability to subject it to regulation is not without constraints.”³⁶⁷

The FCC’s most important Internet decisions also reflect that Title I regulation of information and Internet services is different and, at most, very light, further evidencing the chasm between the Act and the NPRM.³⁶⁸ For example, in the IP-enabled services rulemaking notice, the FCC noted “its established policy of minimal regulation of the Internet and the services provided over it.”³⁶⁹ Similarly, the Commission noted the difference between common carrier regulation and the alternative of ancillary regulation: “Various regulatory obligations and entitlements set forth in the Act—including a prohibition on unjust or unreasonable discrimination among similarly situated customers and the requirement that all charges,

Id. at 644. This strongly suggests that although an entity may take on the obligations of common carriage by holding itself out indifferently to provide communications service to the public, the FCC was not delegated the authority by Congress to force common carrier status on non-common carriers. This situation is distinguishable from those cases in which the FCC has created a new service, and specified that those wishing to provide it must operate as common carriers. See, e.g., *In the Matter of Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to provide International DBS Service*, Report and Order ¶ 45, IB Docket No. 95-41; 11 F.C.C.R. 2429; DBS-88-08/94-13DR, Release Number FCC 96-14, Released 1/22/96.

³⁶⁶ *Computer II Final Decision*, 77 F.C.C.2d at 430 ¶ 119.

³⁶⁷ *Id.* at 432-35. The D.C. Circuit recognized that the FCC had defined an “alternative regulatory scheme” for common carrier-provided enhanced services. *CCIA*, 693 F.2d at 212.

³⁶⁸ See Joint Amicus Brief at 26-27.

³⁶⁹ *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4865 (2004).

practices, classifications, and regulations applied to common carrier service be ‘just and reasonable’—attach *only* to entities meeting this [common carrier] definition.”³⁷⁰

The *Vonage* order, in which the FCC preempted state regulation of VoIP services, noted “the Commission’s long-standing national policy of nonregulation of information services, particularly regarding economic regulation.”³⁷¹ The Commission recalled its history: “In a series of proceedings beginning in the 1960s, the Commission issued orders finding that economic regulation of information services would disserve the public interest because those services lacked the monopoly characteristics that led to such regulation of common carrier services historically.”³⁷²

These themes were also echoed when the FCC classified all Internet services as “information services,” which the agency said “establishes a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications.”³⁷³ In so doing, the FCC noted that “a wide variety of competitive and potentially competitive providers and offerings are emerging in this marketplace.”³⁷⁴ Finally, the FCC thought that Congress itself was pushing policy in the direction of “light” regulation: “[W]e must consider the broadband objectives Congress established in section 706. Those objectives make clear that the Commission must encourage the deployment of advanced telecommunications capability to all Americans by removing barriers to infrastructure investment.”³⁷⁵

Subsequently, the Commission extended the deregulatory “information services” classification to both broadband over power line (BPL) and wireless broadband services.³⁷⁶ In each case, the Commission determined that the BPL and wireless providers offered broadband Internet access as a single, integrated service (i.e., Internet access) that inextricably combined the

³⁷⁰ *Id.* at 4879 (emphasis added); *see also id.* at 4892 (“The Act distinguishes between ‘telecommunications service[s]’ and ‘information service[s],’ and applies particularly regulatory entitlements and obligations to the former class but not the latter.”).

³⁷¹ *Vonage Order*, *supra* note 193 at 22416-17.

³⁷² *Id.* at 22417.

³⁷³ *Wireline Broadband Order*, *supra* note 6 at 14855.

³⁷⁴ *Id.* at 14880.

³⁷⁵ *Id.* at 14894-95.

³⁷⁶ *See Broadband Over Power Line Order*, *supra* note 57, ¶¶ 9; *Wireless Broadband Declaratory Ruling*, *supra* note 57, ¶¶ 18, 22–26.

transmission of data over cable, wireline, power line or wireless networks with computer processing, information provision, and computer interactivity, enabling end users to run a variety of Internet applications such as email, newsgroups, and interaction with or hosting of web pages.³⁷⁷ In every case, the Commission classified the broadband Internet access service as information service in furtherance of the Congressionally-mandated, de-regulatory policy goals intended to spur the growth and deployment of these broadband services, as reflected in sections 7 and 230(b) of the Communications Act and section 706(a) of the 1996 Act.³⁷⁸ The Commission cannot now claim that imposing network neutrality regulation on broadband ISPs is “reasonably ancillary” to the very same provisions, even assuming *arguendo* such policy provisions could support an exercise of regulatory authority.

The Supreme Court upheld the FCC’s regulation of cable service prior to the addition of Title VI to the Act, in part, because it viewed the cable regulations under review as continuations of longstanding Title III goals for the regulation of broadcast television services.³⁷⁹ The NPRM, in contrast, marks a radical departure from the FCC’s implementation of Congressional policy to leave the Internet and provision of interactive computer services “unfettered by Federal or State regulation” and to promote the deployment of advanced telecommunications capabilities through de-regulatory actions.³⁸⁰ The FCC’s ancillary powers have been upheld insofar as they further longstanding regulatory goals established by Congress.³⁸¹ The huge overreach in regulatory authority necessary to support the proposed network neutrality rules far exceed the scope and scale of all prior sanctioned exercises of such authority.

³⁷⁷ These applications, the Commission held “encompass the capability for ‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,’ and taken together constitute an information service as defined by the Act.” *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14863-64, ¶ 14 (*Wireline Broadband Internet Access Services Order*); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 25-26 (Mar. 22, 2007) (*Wireless Internet Declaratory Ruling*); *Cable Modem Declaratory Ruling*, *supra* note 6, ¶ 38; *Broadband Over Power Line Order*, *supra* note 57, ¶ 8.

³⁷⁸ See, e.g., *Wireless Internet Declaratory Ruling* ¶ 27.

³⁷⁹ *Southwestern Cable*, 392 U.S. at 177-78; *Midwest Video I*, 406 U.S. 649.

³⁸⁰ 47 U.S.C. §§ 230(b)(2); 1302(a).

³⁸¹ *Midwest Video I*, 406 U.S. 649.

V. CONCLUSION

The NPRM places its proposed rules in a long continuum of prior FCC actions that purportedly concerned the “openness” of the Internet to demonstrate that it is not “writing on a blank slate in this proceeding.”³⁸² More specifically, the NPRM correctly notes that “it has long been U.S. policy to promote an Internet that is both open and unregulated.”³⁸³ This is certainly true. The Act contains no Congressional directive to the FCC to regulate the Internet, interactive computer services, or information services. Sections 230(b) and 706(a) constitute the “ends” that Congress has identified for the Commission to pursue. To the extent that Congress has spoken about the “means,” it has indicated an affirmative desire to leave the Internet and interactive computer services unregulated.

With respect to regulation of information services, the Act is largely silent. While it is indisputable that the Commission possesses some implicit or ancillary jurisdiction over information services, any regulation proposed must be linked, with the necessary degree of “ancillariness” to some operational regulatory authority explicitly delegated by Congress in Titles II, III, and VI. None of the statutory provisions relied upon by the Commission pass this test. Moreover, the NPRM significantly departs from prior understandings of the FCC’s limited ancillary authority, its powers over Internet and information services, and the analysis necessary to support an exercise of regulatory authority. In contrast to cases in which its ancillary jurisdiction has been upheld, the proposed network neutrality rules would regulate an Internet service in the absence of a close connection to a regulated service over which the FCC has clear and explicit authority. The Commission greatly overreaches its jurisdictional bounds by attempting to exert regulatory authority over the Internet and exceeds the scope of all previous exercises of its ancillary jurisdiction with its proposed network neutrality rules.

The Act simply does not grant to the FCC general regulatory authority over the Internet, consistent with affirmative Congressional desire to keep it unregulated. And the Internet has flourished immensely under this framework. The NPRM abandons this wise policy course by proposing extensive regulation of Internet services pursuant to the very same statutory provisions and policies cited in support of its earlier de-regulatory moves. This strongly suggests that the

³⁸² NPRM at ¶¶ 24-47.

³⁸³ *Id.* at ¶ 47.

rules proposed contravene both Congressional intent and the agency's own settled understandings of that intent.

The Commission's view that it may use its ancillary jurisdiction to regulate based solely on broad policies contained in the Act would give the Commission almost limitless jurisdiction to regulate any communications technology at will. This theory would essentially render the majority of the provisions of the Act meaningless, including the carefully crafted Congressional directives. Express delegations of regulatory authority by Congress are important for two reasons: they both give power and limit its exercise in ways agreed upon by our elected representatives through duly-enacted legislation. If there are to be "rules of the road" for the Internet, it is Congress that must write them. Paraphrasing Chief Justice Burger's observation in *Midwest Video I*, the explosive development of the Internet "suggests a need for a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."³⁸⁴

In the meantime, the Commission is well within its rights to expand its aspirational Internet policy principles to include the principles of non-discrimination and transparency, but it should refrain from attempting to codify them in the absence of an explicit delegation of authority over this area by Congress. It is particularly important that unelected government officials stay within the bounds of their delegated authority. Our individual freedoms as well as our democracy depend on it.

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³⁸⁴ 406 U.S. at 676.